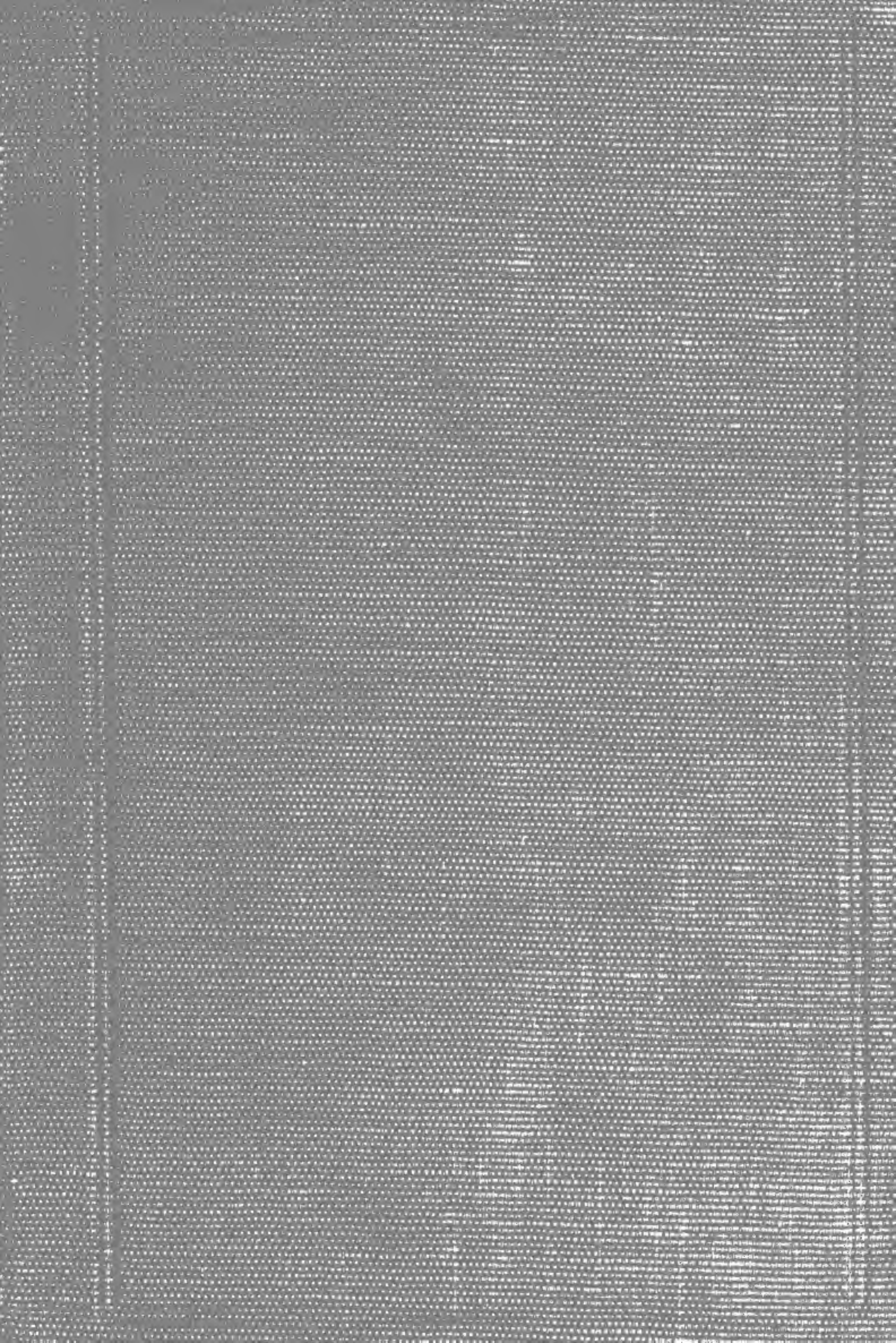

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No. 4582

United States

Circuit Court of Appeals

For the Ninth Circuit.

DAVID G. LORRAINE, and THE LORRAINE CORPORATION, a corporation,

Appellants,

vs.

FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY,

Appellees.

Transcript of Record.

Vol. 2.

[Pages 609 to 1144, inclusive.]

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

FILED
APR 30 1925
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(Testimony of Francis M. Townsend.)

MR. WESTALL: I think the Court can see it pretty well.

A If you have compasses in your pocket, or anyone around there, that will determine it immediately. My eyes are not correct enough to see whether or not there is a difference in the length between the model arm and the drawing arm. It wouldn't make any difference in the operation of the trap anyway. You must be assuming that the ball then would in its upward movement strike the under cone, is that true, Mr. Westall?

Q The point that I have in mind is that if that ball as shown in Defendants' Exhibit YY were to go to the extreme upward range of its movement it would not strike the center of the cone, but would strike one side perhaps about half way down the cone so that it could not rise up inside of the cone as shown in your model.

A I may answer that by asking you how high the oil would have to be in that trap before that ball would strike the cone.

Q. I don't know about that.

A It would be up a pretty good distance, wouldn't it?

Q It would be too high for any practical operation, there is no doubt about that; but the point is that the model obviously is not made to scale.

A Oh, obviously a tin model can't be perfect.

Q In referring to Defendants' Exhibit FF you stated that you made this according to the scale of the drawings of the Lorraine patent.

(Testimony of Francis M. Townsend.)

A I stated that I instructed him to make it in proportion with the drawings of the Lorraine patent.

Q Why did you not, in making up your model of the Trumble trap last referred to, make it to the scale of the Trumble patent?

A Because we were not sued on the Trumble patent.

Q Still that Trumble patent was what you sued Mr. Lorraine on at one time, wasn't it?

MR. F. S. LYON: We object to that as purely argumentative and immaterial. It cannot affect this case at all. The question is a model here, and we have a model of what we were building, and that is what we want to compare.

THE COURT: It has already been testified to that there was such a suit and there is no dispute about that.

MR. WESTALL: I was asking why he didn't make it in accordance with his patent rather than in accordance with the drawings.

A That patent is not in question.

Q You have stated that you never made a trap in accordance with the drawings of that patent, have you not?

A I don't remember making such a statement.

Q Did you ever make any trap in accordance with the drawings of the Trumble patent referred to?

A Do you mean identical with the drawings of the Trumble patent?

Q Well, substantially so.

(Testimony of Francis M. Townsend.)

A Substantially, yes.

Q When you say substantially what differences do you imply?

A I mean to say that the operation of the trap that we manufactured was identical with the operation disclosed and described in the Trumble patent.

Q What differences do you have in mind between the traps that you made substantially according to those drawings?

A For illustrative purposes only there is the form of valve or closure of the oil outlet illustrated in that claim, which is all that is necessary, or that is sufficient for the Patent Office or for the instrument which is addressed to those skilled in the art to which it appertains to make and use the same. The valve as disclosed in the Trumble patent we will assume is simply equivalent to the ordinary cross indicated in mechanical drawings to denote the position of a valve, and the requirements of the patent law do not exact that the inventor show any particular form of valve that he would want to use.

Q That would also apply to any particular form or location of the partition of his receiving chamber, would it not?

A To whom are you referring now about a partition for a receiving chamber?

(Question read).

A Are you speaking of Mr. Lorraine?

Q Of Mr. Lorraine's patent.

(Testimony of Francis M. Townsend.)

A If Mr. Lorraine had not specifically defined the location, the arrangement and the contour of his partition, then there might have been something left to speculation as to what that partition was; but he has definitely located his partition and defined its functions so that no doubt remains as to what that partition is.

Q You are quite familiar, are you, with the Lorraine reissue patent in suit?

A I think so.

Q You know as a matter of fact that in many of his claims he has specifically limited himself to a segmental vertical chamber, and in the claims that we have sued on he has not limited himself to any particular location or form of chamber. Would that not imply, according to your idea of patent law, as you have outlined it in your previous answer, that he was not to be limited to that particular form of location of receiving chamber?

MR. F. S. LYON: We object to that on the ground it is not cross-examination; that it is not a proper subject-matter for an expert witness; and call to the court's attention that such a question as that will leave the door wide open for redirect examination on the claims. Counsel for plaintiff may take his choice, but if he insists upon an answer to this question I shall insist that we have the right of redirect examination on the claims of the patent.

MR. WESTALL: I believe counsel is correct. I will withdraw the question.

(Testimony of Francis M. Townsend.)

A I would like to answer that question, Mr. Westall.

Q Well, then answer it. I would just as soon have the witness answer the question as not. It is a matter of law purely and simply.

A The question of the limitation of claims 17, 18 and 19 must be apparent to anyone who understands the English language. The limitation carried in Claims 17 and 18 is that the receiving chamber and the settling chamber are in communication. To be in communication you read your specification, and there it is pointed out to you clearly how that communication is accomplished. In 17 we find this combination of elements: First we have an oil and gas separator for wells. This oil and gas separator includes a receptacle having a receiving chamber therein for the reception of the oil and its constituents, and a settling chamber communicating with said receiving chamber. If they communicate they must in some manner be one affected by the other. It would be doing violence to the English language to say that because a rainbarrel was placed below the eves of a house *the and* drainwater fell from the eaves into that rainbarrel that the rainbarrel was in communication with the eaves; but if the rainbarrel has another rainbarrel alongside of it and it is connected by a pipe, and water is put into one rainbarrel it communicates the same level to the other rainbarrel. Providing that this combination float is mounted in the proper portion of said receptable for regulating the discharge of

(Testimony of Francis M. Townsend.)
the oil therefrom, whereby a substantially uniform volume and level of oil may be maintained in said settling chamber at a point above the vertical center of the receptacle. The dimension specified there is one of the dimensions of a body of liquid. A body of liquid has two dimensions, vertical and horizontal. This claim is limited by its verticle dimension. It has said nothing of the horizontal dimension, therefore that is immaterial. So you are limited there in the claim to the communicating chambers and to the limitation as to the vertical height. There are your limitations in Claim 17. I might repeat this, practically, for the purpose of Claim 18. When you come to Claim 19 you find the combination of oil and gas separator for oil wells, including a separator having a receiving chamber and a settling chamber in communication. There again you find that same communication, and a float in the upper portion of said receptacle pivotally supported on the walls thereof, and the oil discharge valve communicating with said settling chamber and externally mounted on said receptacle. There is another limitation. You have limited the point of the mount of your valve, which is explainable in this case, namely, that Mr. Lorraine had a very heavy valve mechanism, and to mount it, as Trumble did, in the outlet pipe would be too great a weight to carry, so he mounts it on his receptacle, which must give that an element of novelty. Trumble in all instances has mounted his valve in the outlet pipe at a point remote from the receptacle. I can

(Testimony of Francis M. Townsend.)
name a great many other limitations, but I think I have said enough.

Q How many traps, if you know, did you buil*t* with the inside valve that you have referred to on your direct?

A I cannot inform you; I have no data today at hand to testify from, and my memory does not go to that.

Q But you do know that there was a great many of them manufactured, do you not?

A I don't think there was a great many; there were several manufactured, but just how many I don't know.

Q Fifty or a hundred or two hundred?

A I couldn't say.

Q There may have been two hundred manufactured?

A I am not prepared to say what number there was.

Q Now you have stated on your direct examination that there was no new result attained in your later model of trap, namely, the model adopted in April or May, 1921?

A I didn't make that statement. I stated that the results attained were to attain more power through enlargement of the float, which gave displacement to the liquid and enabled us to use a lap valve that would compensate for the wear.

(Testimony of Francis M. Townsend.)

Q So that it is a fact, then, that if you said there was no new result, that you did have a trap with greater efficiency and a better trap; is that true?

A It depends upon what you call efficiency. If efficiency is gained by having less trouble with valves, cutting out, why, that is true; but there was no difference whatsoever in the separation of the oil and gas.

Q Well, you could not use the ball float with that form of valve that you mentioned and referred to in answer to the last question?

A We didn't have displacement enough, no, for the ball float.

Q So that with your present float and present construction you must have a verticle float; is that not true?

A I don't know whether we are confined to a vertical float or not. We might use some other form of float, mechanically. I don't see as we are confined to any particular disposition of the float, whether it is vertical, horizontal, or has an inclination. So long as it gives the old, well known mechanical operation of actuating the float arm to the proper degree, I cannot see that it would make any difference as to the inclination of that float. It is a question entirely of the displacement of the oil.

Q You have referred to the normal oil level. Their trap has a level which might be referred to as the normal level, does it not?

(Testimony of Francis M. Townsend.)

A If the egress of the oil is equal to the ingress of the oil, then you would have a normal level, of course, but if the ingress of the oil *excess* the egress, you would have an accumulation of oil in your trap. If the egress of the oil is in excess of that of the ingress, you would naturally have a falling surface.

Q Would the normal oil level be the average between the two extremes of fluctuation?

A It would be at that point of equilibrium where the outgoing oil and incoming oil were the same. Now I cannot answer you definitely, because to do so would be meaningless.

Q Their trap to operate satisfactorily must have a level of oil which ordinarily would be called normal, that is, a point, perhaps, which could be referred to as that point of equilibrium, which you have heretofore referred to, is that not correct?

A I have referred to the normal level and defined it as specifically as I know how, and that is that the oil going out and the oil coming in are equal. If you have a well that produces by heads, and that opening permits a great volume of oil to come into your trap, it must affect your outlet valve through the medium of the float before that oil can escape. Now it has got to go through that outlet valve, and the float is the thing that operates that valve, and until that float has opened that valve wide enough to allow that excess of oil to escape you are going to have a higher level of oil in your trap; but as soon as that oil is liberated from your trap, then the float would

(Testimony of Francis M. Townsend.)

come down and the equilibrium would be restored, or what you term the common level.

Q Does every trap that operates satisfactorily have that normal level which you have spoken of?

A It depends upon the character of the well.

Q What wells would have a normal level of oil?

A I cannot answer that.

Q Would it be a large proportion?

A I cannot answer that, because I am not spending my time in the oil fields.

Q Then do you mean to say that there would be no traps at all that would operate satisfactorily without the normal oil level that you have referred to?

A Will you kindly state that again, Mr. Westall? I don't believe I understand what you mean.

(Question read).

A Mr. Westall, that question is meaningless to me.

Q Did you ever hear of any trap that operated satisfactorily that didn't have an oil level that could be called normal?

A Really, it seems to me that anyone that knows anything about the production of oil from wells will know that oil coming from the bowels of the earth comes in gushes, and the proportion of wells that produce a steady, constant flow is very rare. There may be such instances, but I am not prepared to say that I can answer your question, because I do not understand it. I don't know what you are driving at.

Q BY THE COURT: Is there an average point from which the variations slide?

(Testimony of Francis M. Townsend.)

A That depends, Judge; it depends upon—

Q I know what it depends on.

A I cannot answer the question, because I couldn't make an intelligent answer.

Q No two wells are alike, and the same well might be different an hour from now than it is now?

A Absolutely.

Q So you could not establish that unless you took a series of observations and averaged them up?

A Your Honor, there are no two wells that act exactly the same, and there are no two wells that produce identically the same gravity of oil.

Q BY MR. F. S. LYON: Your statement, when you speak of the normal level, means that if the head coming in is constant then the level would remain at the same point?

A Yes; the pressure affects the discharge.

Q BY MR. WESTALL: Every well that is equipped with a trap, and which operates satisfactorily, has a certain degree of fluctuation in the level, does it not, either great or small?

A I don't know; I presume so. I couldn't answer that. My knowledge does not go to that. I have not been in the field to determine that. I am not a service man and have not been in the field to study conditions there.

Q You do know, however, that there is a variation in the levels, which variation is different in different wells?

(Testimony of Francis M. Townsend.)

A So I have been informed, but I have had no experience to that effect.

Q You have been out in the field and examined the traps many times, have you not?

A Oh, yes, quite a number of times.

Q And you are and have attempted to qualify as an expert as to the operation of gas traps, have you not?

A I beg your pardon; I didn't qualify as an expert in the operation of gas traps.

Q Well, you have described fully the operation of Trumble traps and of the Lorraine traps. Now do you mean to say that you might be mistaken in the operation of them?

A In the operation of wells?

Q I am talking about gas traps, and how they operate.

A Yes, I can tell how they operate, but I cannot tell you about the operation of the wells.

Q I am asking you about the operation of gas traps particularly. Now on all your gas traps you have a gage glass, haven't you?

A I think that all traps sent out were provided with a gage glass, yes.

Q And on the traps made prior to April, 1921, that gage glass was just above the seam between the conical base and the cylindrical portion of the trap, was it not?

A I couldn't tell you exactly as to the location, but it was somewhere along there, yes, sir.

(Testimony of Francis M. Townsend.)

Q And some time after April, 1921, you raised your gage glass, didn't you, so that it was up in the center of the trap, approximately?

A I think, Mr. Westall, you will find that we lengthened the vertical side walls of the trap instead of raising the gage glass. Perhaps if you measure it —now, I have never measured it at all—I think you will find that we extended the vertical side wall down, and that gives the appearance of raising the gage glass.

Q Instead of raising the gage glass you lengthened the vertical side wall down?

A I don't think we raised the gage glass; I know we lengthened the vertical side wall, leaving the pivotal point of the float arm exactly the same or possibly a little bit lower than it was in the old former trap.

Q What was the purpose of the gage glass?

A Well, I suppose it was identically the same as you use a gage glass on a boiler. As a substitute you can put on pet cocks on the different boilers. Mr. Lorraine never used a gage glass on any of his traps, so I don't presume it was of any utility.

Q What particular utility did you have in mind when you equipped your traps with gage glasses?

A It might be like an automobile, putting something on to kind of decorate it, but I don't know.

Q Were these gage glasses put on there to decorate the traps?

A I don't know; they might have been, and they may not have had any utility for them. I have heard the witnesses say here in court that they never con-

(Testimony of Francis M. Townsend.)

sulted the gage glass to find out how the oil ever ran, that they could tell that by the arm sticking out.

Q You have heard at some time or other that the gage glasses were intended to indicate the level of the oil?

A I suppose so, yes. Naturally I would infer that.

Q Those gage glasses were made on your traps from 1914 to 1921, of sufficient length to register or show the different variations of the level of that oil?

A I presume so.

Q So that the oil level in those traps was intended by you and your associates in their manufacture to enable the operator to determine where the oil level was by the glass?

A That didn't control the oil operator.

Q It would show that?

A To look at that to see if the oil was in the gage glass or if it was above that, I would say that I wouldn't know how high it is by the gage glass. I could see by the float lever arm; I could tell how high it was by that. Mr. Lorraine has found that was in practice, I believe.

THE COURT: Mr. Lyon, do you expect Mr. Townsend to be here tomorrow?

MR. F. S. LYON: Yes, your Honor. But I have one question I would like to ask Mr. Townsend before we adjourn, one that I overlooked heretofore.

Q What is the pamphlet I now hand you?

A That is a catalog we sent out showing and explaining the Trumble gas trap as we now manufacture and sell it.

(Testimony of Francis M. Townsend.)

Q That was first put out in what month?

A May, 1923.

MR. F. S. LYON: We offer this in evidence as Defendants' Exhibit DD.

(Thereupon a recess was had until Tuesday, April 29, 1924, at ten o'clock a. m.)

LOS ANGELES, CALIFORNIA, TUESDAY, APRIL 29, 1924. 10 A. M.

(Appearances as heretofore noted).

FRANCIS M. TOWNSEND recalled.

CROSS EXAMINATION resumed

BY MR. WESTALL:

Q You have referred to a model said to represent the later Trumble trap, namely, Defendants' Exhibit HH. I believe you stated that that was made from working drawings. Can you produce the working drawings that that model was made from?

A I think the blueprint is here; yes, sir.

Q Will you kindly produce it?

A It is for the No. 1 trap.

Q BY MR. F. S. LYON: Is it T. W. 107?

A No. This is it. May I see the model just a moment? That is Plaintiff's Exhibit No. 8.

Q BY MR. WESTALL: And this model is supposed to have been made according to the scale of this drawing, is it?

A Yes, sir.

MR. WESTALL: That is all.

(Testimony of Francis M. Townsend.)

REDIRECT EXAMINATION

BY M. F. S. LYON:

Q I am going to ask you some questions in regard to gage glasses on the Trumble traps, and particularly with relation to the gage glasses on traps like Defendants' Exhibit YY and other traps. Will you illustrate to the Court what effect, if any, with regard to such gage glass the level of oil or anything of that kind has been affected by making the bumped bottom construction instead of the cone construction?

A I could probably graphically illustrate that by putting some additional lines on this blueprint. By taking a sheet of longer dimensions and continuing the sheet down to that point and putting in the bumped bottom in that shape we have our gage glass still in the same location.

Q The marks you have made have been made with chalk on this exhibit, have they?

A Yes; on Exhibit YY.

Q And put them on the other exhibit also.

A Yes, sir.

Q What change in function, mode of operation, or result did such change from a conical to a so-called bumped bottom construction make?

A No change at all in the mode of operation or the function of the trap.

Q I now show you Defendants' Exhibit V, and direct your particular attention to the float of the Lorraine trap as therein illustrated, and will ask you to compare the same with the float of the Lorraine re-

(Testimony of Francis M. Townsend.)
issue patent in suit as to its general construction and mode of operation.

A The float in the Lorraine reissue letters patent travels in a vertical plane when actuated through the displacement of the liquid. This plane was maintained through the arm 38, which was parallel with the float arm 53, which caused the float to maintain a vertical position at all times during its movement. This float, furthermore, is termed in the patent specification as a pneumatic element which comprises a closed, sealed chamber having a check valve in its top, which permitted it to be filled with air under compression in order to overcome the exterior pressure. In the float of the changed Lorraine construction, as shown in Defendants' Exhibit V, the float is mounted on the end of the float arm and in its travel describes the arc of a circle. It is not permitted by its mounting to travel in a vertical line. Furthermore, such float is provided with a trapped means for admitting the pressure from the outside of the float to its interior, thereby doing away with the compressed air medium as a means of reinforcing the float of his patent.. This style of float which admits the pressure to the interior of the float is identical with the Trumble float last adopted.

Q How, Mr. Townsend, is the illustration of this Lorraine gas trap Defendants' Exhibit V with relation to the position of the float and the vertical extension of the receptacle?

MR. WESTALL: We object to that on the ground that the drawings speak for themselves.

(Testimony of Francis M. Townsend.)

THE COURT: For the purposes of illustration he can state it.

A The float is located by its pivotal point 9-½ inches from the bottom of the receptacle and is 12 inches from the top of the receptacle.

Q BY THE COURT: You are speaking now of a reduced scale?

A Yes, sir; on the drawing.

Q BY MR. F. S. LYON: And the oil outlet pipe in this working drawing of the present Lorraine traps, Defendants' Exhibit V, is shown as about where with relation to the bottom of the trap?

A 5 inches from the bottom of the trap on the drawing, and is a little over 16 inches from the top of the trap on this drawing.

Q The date of this working drawing is October 4, 1922. How does that date compare with the date when the defendants actually had Trumble traps delivered and in use embodying their Trumble elongated float of the Trumble float patent?

A My memory is that it was in March, 1921, that the present style of float was first adopted and put in use in traps.

MR. F. S. LYON: You may take the witness, Mr. Westall.

RECROSS EXAMINATION

BY MR. WESTALL:

Q In giving the dimensions with reference to the Lorraine trap, referring to Defendants' Exhibit V, you included the dome as part of the trap, didn't you?

(Testimony of Francis M. Townsend.)

A I included the dome as part of the receptacle.

Q As part of the receptacle?

A Yes, sir.

Q In referring to Plaintiff's Exhibit 8, the Trumble trap, and giving dimensions, you did not include the dome on top of that trap as part of the receptacle, did you?

A I didn't give any dimensions at all, Mr. Westall.

Q In referring to it at any time in any of your testimony you have not considered the dome on the Trumble trap as part of the receptacle, have you?

A That is the means for delivering the oil into the receptacle, so it would not be a part of the receptacle.

Q Still it is a dome, and the oil comes in that dome, and it is in open communication with the rest of the receptacle, isn't it?

A It is of such small capacity that I should hardly think it proper to denominate it as a dome.

Q What is the capacity of that extension on the top of the Trumble trap? Can you tell by reference to this drawing?

A I presume there is a scale there so that you can tell. I haven't examined it. I don't see any marking here to indicate exactly the cross-sectional area of that portion you termed a dome, but estimating it from the 8-inch pipe which enters it on the side, I judge that it is about 10 inches in cross-sectional area.

Q Now what are the dimensions of the gas outlet pipe that extends up above the trap; can you tell that?

(Testimony of Francis M. Townsend.)

A That is a 3-inch pipe, I think; yes, a 3-inch pipe, the gas outlet.

Q At the bottom of the trap, the extreme bottom of the tapered portion, is marked "6-inch coupling", isn't it?

A Yes, sir.

Q Now you have heard in the prior testimony that stand-pipe upon which some of these traps rest referred to as part of the receptacle, have you not?

A Yes, sir.

Q And that, apparently, is a 6-inch pipe, isn't it?

A Yes, sir.

Q Now, then, is there any less reason for considering the upper gas outlet pipe and the dome on the Trumble trap as part of the receptacle than there is in the case of this stand-pipe on which the Trumble trap rests?

A Yes, there is a great deal of difference.

Q There is a great deal of difference?

A Yes, certainly.

Q What is that difference?

A This device at the top of the trap is the means for admitting the oil; it is nothing more than a conduit to direct the oil onto the top of the distributing cone. This is the receptacle in the true sense, because it receives and holds—

MR. F. S. LYON:

Q When you say "this is" in your last answer, you refer to what?

(Testimony of Francis M. Townsend.)

A I mean the pipe upon which the trap is mounted and connected to this coupling here. This is merely a conduit and in no sense a receptacle.

Q BY MR. WESTALL: The conduit receives oil from the well? Isn't the conduit a receptacle that receives oil from the well?

A It directs it; it controls and directs its direction of flow. It in no way stops it as a receptacle.

Q The dome on the top receives and acts as a conduit for the oil to carry it down to the bottom portion of the receptacle?

A That is what I say, it is a conductor.

Q So the chamber above the top baffle plate also receives and acts as a conduit for the oil in the same way as the pipe that leads from the oil well? It receives and acts as a conduit to conduct it to the settling chamber, doesn't it?

A If you want the technical distinction of fine lines drawn, you might say that the entire wall here is a receptacle, because the oil is contained in this and the gas is contained in that.

Q That is the point I am getting at. There is just as much reason for calling the upper portion of the trap a conduit as there is receptacle? There is also the same reason that applies to the pipes that lead from the well to the dome, they are receptacles and they are conduits, too?

A That has no function further than the direction of the oil onto these spreader plates, or baffles.

(Testimony of Francis M. Townsend.)

Q These spreader plates, one of the functions is that they direct the oil onto the walls of the separator proper?

A They send it down and direct it onto the walls of the receptacle; they have no other function.

Q Now yesterday, in discussing the question of infringement, I understood you to say that the reason why you didn't consider the Trumble device an infringement—one of the reasons—was that the chamber in which the oil was received did not communicate with the bottom part of the receptacle; is that correct?

MR. F. S. LYON: We object to that as not recross examination.

THE COURT: If it is preliminary, he may answer; if that is the purpose.

A Will you explain what you mean by the chamber in which it is received?

Q BY MR. WESTALL: The portion above the baffle plate.

A The portion above the baffle plate is not a chamber.

Q Why isn't it a chamber?

A Because the walls of the receptacle are spaced apart from the lower edge of the baffle in the entire circumference, and a chamber must imply at least an inclosed space.

Q Then for the same reason you would not call the segmental portion of the Lorraine trap a chamber, would you?

(Testimony of Francis M. Townsend.)

A It is closed at its bottom when the oil seal is there and open at its top, and if you so pleased you might term it a chamber and make your meaning understood to others.

Q Was that the only reason, that I have suggested, that you didn't consider the Trumble trap to be an infringement of those claims?

A Certainly not.

Q What other reasons did you have?

A The Trumble device cannot be an infringement of the Lorraine patent for the reason that its arrangement of parts, its mode of operation, and its entirety is at the present time the same in all respects as it was in the first traps we manufactured in 1914, and which are still in use and have been used continuously since that time. And, furthermore, the mode of operation of the Trumble trap and the Lorraine trap are different.

Q Well, as to one of the reasons, then, you consider that the Trumble trap does not infringe because the Lorraine patent is anticipated; is that your reasoning?

MR. LYON: We object to that as a conclusion of law.

THE COURT: Objection sustained.

MR. WESTALL: Note an exception. That is all.

MR. F. S. LYON: That is all, Mr. Townsend.—Just a moment. I will ask you one question, Mr. Townsend, in regard to Plaintiff's Exhibit 8.

(Testimony of Francis M. Townsend.)

Q At the top of the receptacle proper is what Mr. Westall has referred to as a dome. Now the oil inlet pipe leads into that dome?

A It does.

Q And where is the gas outlet pipe?

A There is none from that excepting with the oil in the downward travel above the spreader cone, and from that point it passes around the edge of the spreader cone with the oil and goes below the spreader cone.

Q Then as far as the outlet chamber is concerned, that so-called dome is simply an inlet through which the gas outlet pipe projects; is that correct?

A That is one of its functions. The other function is to permit the oil to be admitted on top of the spreader cone in a distributed condition.

Q Do you find anything comparable in this so-called dome of the Trumble trap, Plaintiff's Exhibit 8, with the dome on the top of the Lorraine trap, Defendants' Exhibit V?

A I find nothing comparable to it at all. In the Lorraine trap the extended portion or dome serves only as a gas chamber from which the gas is led by means of the gas outlet pipe.

MR. F. S. LYON: I call the Court's attention to the drawings.

(Discussion).

MR. WESTALL: Of course the court should understand we are not suing on this drawing of the Lorraine patent; we are suing on the patent. The patent

(Testimony of Francis M. Townsend.)
has no development of that kind, so this testimony has very little relevancy.

MR. F. S. LYON: It has a great deal of relevancy in regard to what, if anything, has made the Lorraine trap even successful. One more question, Mr. Townsend.

Q You have been asked some questions on redirect in regard to the reasons you didn't consider the original Lorraine traps, as issued, infringed by any of the Trumble traps. Now the claims, 3, 4, and 5, of the original Lorraine patent call for the automatic and synchronized valve arrangement and control of the oil and gas outlets; is that correct?

A It is; that is correct.

Q Was that a feature which you had in mind also?

MR. WESTALL: We object to that on the ground it is no part of the claims sued on, that combination of valves. If we wanted to sue on those we would have declared on other claims than those we have. That is totally incompetent, irrelevant, and immaterial, and not proper redirect examination.

MR. F. S. LYON: The purpose of it is to show the departure, and the fact that the Lorraine reissue is not for the same invention as that for which the original patent issued.

THE COURT: Objection overruled; he may answer.

MR. WESTALL: Note an exception.

A I also found that Claim 5 was on a combination of a float with its actuating arms which compel it to

(Testimony of Francis M. Townsend.)
travel in the vertical position. None of the claims nor any suggestion that I received from the specification of the original patent suggested any or the parts of our trap under construction and in use.

Q BY MR. F. S. LYON: And did you find in this original Lorraine patent any indication that the patent was addressed to any relative height of the oil level whatever?

A I found no suggestion in the specification or in the claims that it referred or considered that the height of the oil column had anything to do with the invention.

MR. F. S. LYON: You may take the witness.

Q BY MR. WESTALL: Now during the operation of these traps the upper portion of the receptacle above the oil level is full of gas, isn't it?

A It is presumed to be full of gas at times, but in some wells there may be a large amount of foam that may partially fill it.

Q And the pipe leading from the top of the receptacle to the gas outlet is also full of gas?

A The gas outlet pipe is designed to convey gas away from the chamber.

Q So that both of those parts act as receptacles and conduits for the gas that is separate, do they not?

A The receptacle acts as a receiving means for both oil and gas.

Q Now it is a fact, isn't it, that in the later Trumble traps you have adopted this construction substantially as shown in this drawing of the Lorraine patent,

(Testimony of Francis M. Townsend.)
Defendant's Exhibit V, drawing your gas off from the top of an extension on the trap?

A No, sir.

Q Have you never used that?

A We haven't used any extension on the top of our trap for the purpose of collecting or conveying gas away from the chamber. Mr. Westall, pardon me, I wish to make a correction there. We did make some traps that had a gas scrubbing extension above the oil inlet, if that is what you are inquiring about.

Q A pipe that extended up into the upper portion, similar to the Lorraine drawing Defendant's Exhibit V?

A I can explain that, perhaps, to you, if you are speaking of our ordinary traps for the ordinary wells. Instead of putting on what you termed a dome we have made an oil inlet alone and run the gas line inside of the trap up to the top of the bumped top and let it down on the inside of the trap. If I can have that exhibit of the catalog that was put in yesterday, I think that shows that, and I can explain it in an instant.

Q BY MR. F. S. LYON: Show it to the Court, too.

A This gas pipe here is open at that end and comes down on the inside instead of going out through that way. There are two outlets provided, but this will permit the gas to come down this way and pass out the side in that line, which is the full equivalent of letting it out there, or it can be connected up and taken off here if you want to close that outlet.

(Testimony of Thomas F. Morgan.)

Q Where is the outlet from the trap into this gas pipe?

A There it is slotted so that the gas enters at H.

Q Below the cone?

A Below the cone, yes. This cone is fastened up to this gas pipe here by welding so that there is no connection or communication from below this cone with above the cone. The gas passes in there, if you want to use this outlet. If you want to take it on out the other way you take that safety valve off and connect on there, and your gas will go out the top. There is the oil inlet there and there is no connection between this space here and this space above the distributing cone.

MR. WESTALL: That is all.

Q BY MR. F. S. LYON: In this last trap, Mr. Townsend, that you have explained to the Court, is there any gas collection chamber of any kind above the cone?

A No, sir.

MR. F. S. LYON: That is all.

THOMAS F. MORGAN recalled.

MR. F. S. LYON: May it please the Court, Mr. Townsend must leave here tomorrow morning in order to keep his appointment with the Internal Revenue Department at Washington. I suppose there is no occasion for his remaining.

THE COURT: That is wholly within the discretion of counsel to excuse the witness, unless the other side requires him.

(Testimony of Thomas F. Morgan.)

MR. WESTALL: I don't think we will require him.

CROSS EXAMINATION resumed

BY MR. WESTALL:

Q Mr. Morgan, on the prior examination you said that you had the first opportunity of seeing a trap at Hole 18 in operation in 1918.

A Yes, sir.

Q How do you fix that time?

A That is when I went to work over on the Hole lease.

Q And do you know exactly the day that you went to work?

A On the Hole lease?

Q Yes.

A No.

Q Did you say it was December, 1918?

A It was in the fall; possibly in November.

Q Possibly November?

A Yes.

Q Might it have been December?

A I think I did a good deal of work, or I think I was on the Hole lease during the month of December, 1918, yes.

Q Are you sure it wasn't 1919? There wouldn't be any danger of your making a mistake of that length of time, would there?

A No.

Q Referring to Defendants' Exhibit UU, Chapman No. 1, on your former cross-examination you said that

(Testimony of Thomas F. Morgan.)

you observed the operation of that trap on the well in August, 1919. How do you fix that time?

A That is when they moved them over there.

Q Did you consult any records or anything to enable you to fix that date definitely?

A Yes, sir.

Q You are positive that was the date?

A Yes, sir; during the month of August.

Q At the time you went to work for the Union Oil Company, August 12th, I believe you said, 1918, how many of these Trumble traps to your knowledge did the Union Oil Company have in operation in that vicinity?

A On August 12, 1918?

Q Yes.

A I didn't know whether they had any or not. That was the first day I went to work for them.

Q Do you know now, or did you find out since, about how many of those traps they had in operation at that time when you went to work there?

A On the Hole lease they had I think six.

Q Six of these old Trumble traps?

A Six Trumble traps, yes.

Q You said that the Union Oil Company also had McLaughlin traps in use in August, 1918, when you were first employed.

A I don't know what they did in August, Mr. Westall. I wasn't over on there until a later date, I testified.

Q When did they have those McLaughlin traps in use that you have referred to?

(Testimony of Thomas F. Morgan.)

A I suppose some time prior to the first time I went over there.

Q Did you see them in operation at the time you went over there?

A Yes; they were up there.

Q How many of them were there?

A I judge there were three or four, or something like that.

Q I believe you said that you or your company manufactured a trap at Hole 5 in 1918 or the first part of 1919, a rebuilt McLaughlin trap. Have you any means of fixing that date definitely?

A I never manufactured it.

Q Did you have anything to do with putting together or rebuilding or assembling that trap?

A Are you talking about Hole 5?

Q Yes. I thought you said Hole 5.

A I didn't say anything about a McLaughlin trap on Hole 5.

Q You did mention a rebuilt McLaughlin trap What well was that used on, if you know?

A Well, there was one on several wells. There were rebuilt traps on several of those wells. There was one on 12, and I think there was possibly one on 5 at this time, and probably one on 4.

Q When were they rebuilt, to your knowledge?

A Sometime around the first of 1919 or the last of 1918.

Q You were present at the time of their being rebuilt, weren't you, or being put on the wells?

(Testimony of Thomas F. Morgan.)

A Yes. Some of them I tore down and sent over to the shop to be fixed.

Q Isn't it a fact that a high oil level enables the sand to settle out better?

A No, sir.

Q It does not?

A No.

Q It has no effect on settling the sand out?

A The shallower your column of oil the faster your sand will settle and the quicker the sand will reach the bottom.

Q I believe you stated that at Chapman No. 1 there wasn't very much variation in the oil level after the trap was adjusted, is that correct?

A I didn't say anything like that.

Q You mentioned one of the wells. What well was it that you referred to?

A I don't think I referred to any particular well having an adjusted oil level.

Q Did you refer to any particular well in which there wasn't much variation in the oil level?

A I may have referred to one of them. I don't remember.

Q Referring to Hole 6, shown in Defendants' Exhibit QQ, you said at record 525: "I don't think on that well the oil level varys but very little." Referring to Chapman No. 1, could you say the same thing as regarding variations of oil level?

A No, I wouldn't say the same thing about that well.

(Testimony of Thomas F. Morgan.)

Q You would say that the oil level varied considerably with Chapman No. 1?

A It sometimes made a head and filled up a little bit.

Q How much would you say that the level varied with Chapman No. 1?

A Oh, I presume it would run—would you like to have a reference to this scale here up alongside of the traps?

MR. F. S. LYON: Yes, if that will indicate it.

Q BY MR. WESTALL: Are you referring now to Chapman No. 1?

A Yes. Sometimes that well would make a big head, and it might fill up to about 7 feet, or 7 feet 2, or 7 feet 3, maybe.

Q And so then it would vary between 6 feet 6 inches from the bottom of the trap as you have given to 7 feet or 7 feet 3; is that correct?

A It might vary that way if the well made a big head.

Q So that when you said the oil level was between the bottom and center of the manhole up in the second gage glass at Chapman No. 1, you mean that that probably was the minimum level and that it would vary and run up maybe to a foot or so higher; is that correct?

A Well, the other day you were talking about trying to strike an average when the well was producing regularly.

Q Will you answer that question? Read the question, please.

(Testimony of Thomas F. Morgan.)

(Previous question read).

A No, not a foot or so higher. I said when the well made a big head at times it might have filled up to 7 feet 2.

Q The oil level then at Chapman No. 1 varied between those points, 6 feet 6 inches, as you have given it on your former testimony, up in the upper gage glass, to maybe 7 feet 2 or 3, is that correct?

A It would get up that high when the well was acting rather unusual, probably.

Q So that most of the time it would have that lowest level that you have indicated, namely about 6 feet 6 inches; is that correct?

A That is where we tried to carry it.

Q How long did you say that you observed the operation of the well when it was carried at that level?

A Oh, at different times.

Q Over what period of time?

A Possibly four or five months; at different times. I was superintendent and was over there during different periods of time.

Q Then they continued, I suppose, after those four or five months to consider that as the proper level of the trap, up to the present day, probably?

A No; I don't know what they did. I left the Union Oil Company a little over a year ago, and since that time I don't know where they have carried the level.

Q You stated that when you observed the operation of that well at the time you took the photographs on April 12 or 13, I believe, that you found the oil

(Testimony of Thomas F. Morgan.)

level substantially the same as it was in those days, didn't you?

A No. I told you the other day that these gage glasses were shut off.

Q Then there was no means of your determining the oil level at the time you took the photographs?

A I didn't try to.

Q You didn't observe the oil level in any way or know what the oil level was at the time you took those photographs, then?

A I tried the gage glasses and they were both shut off, top and bottom.

Q Then you don't know whether the oil level at the time you examined the trap the other day was down in the bottom of the trap or whether it was away up at the extreme height that you have mentioned?

A No, I don't know where it was.

Q Why didn't you examine the float arm outside of the trap to determine that height? Wasn't that a means of indicating the level?

A Which?

Q The float arm extending outside of the trap, on Chapman No. 1.

A You can see the float arm there.

Q Yes; but does that indicate to your mind where the level was?

A Yes, it is an indication.

Q What does it indicate, according to your experience?

(Testimony of Thomas F. Morgan.)

A It indicates the angle at which the lever arm inside of the trap is at the time.

Q From an examination of that float arm how high would you say the oil level was in the trap?

A Right now?

Q As shown in the photograph.

A Well, it would be depending on how much submergence there was. It would be about 6 feet.

Q How high would it be?

A It would be around 6 feet or better.

Q In other words, it would be about at the same place that you have testified it was when you observed its operation for many months when you were there, wouldn't it?

A That arm is in the position, or was placed in a position to show where the oil level was when I operated those traps.

Q So that you don't find any difference substantially in the oil level as shown in those photographs and at the time the trap was first put in operation and during the five months that you have referred to?

A That is about it.

Q You don't know whether the float arm on the inside of the trap was bent up or down, do you?

A No, sir.

Q Wouldn't that be a factor in determining what the level was from the arm on the outside?

A Yes.

Q If the float arm on the inside of the trap was bent up that would make a considerable difference in

(Testimony of Thomas F. Morgan.)

the arm outside of the trap as an indicator, wouldn't it?

A How is that?

(Question read).

Q BY THE COURT: Just by looking at it.

A Yes.

Q BY MR. WESTALL: And conversely, if it was bent down?

A Yes.

Q So that your not knowing whether the float was bent up or down would make observation of the position of the arm as it extended outside of the trap a very unreliable guide, wouldn't it, to determine the oil level?

A Not if you knew the position or the angle the float arm was bent.

Q But you didn't know the angle that the float arm on any of these traps was bent, did you, or whether it was bent at all?

A I don't think on this one, on this particular trap.

Q Chapman No. 1?

A Chapman No. 1. I think it has a cylindrical float in it, and I don't believe the arm is bent.

Q But you don't know about that, though?

A No.

Q You never saw it?

A I never saw the particular float, to my knowledge.

Q Nor you never saw that particular arm that you know of?

A Do you mean inside?

(Testimony of Thomas F. Morgan.)

Q Yes.

A No; not to my knowledge.

Q When you were out on April 12 or 13 you made no effort, as I understand it, to determine that oil level at that time?

A No.

Q You assumed that it was the same as it was when you had an opportunity to observe—

A That didn't interest me. I placed those in the position they were when I operated them, when I had them in charge.

Q You knew that worked that way and you were confident that that would continue to work in that position; is that correct?

A I said I placed them to show the proper angle, or the angle they showed when I was in charge.

Q May I see the photograph of Chapman No. 1 again?

A Yes.

Q It is a fact that there are several heavy weights shown connected to part of the connections of the float arm which extends outside the trap?

A Yes; there is a weight hanging there.

Q It looks like there are three or four of them. Aren't there?

A Yes, there are three or four of them hanging there.

Q What are those weights for?

A To help counterbalance the float.

Q So that that would be another factor to be considered in estimating the oil level from the po-

(Testimony of Thomas F. Morgan.)

sition of the float arm, would it not, in that those weights acting as a counterbalance to the float might raise that float so that it barely touched the oil; isn't that a fact?

A No, I don't think so. Those are what we call an outside butterfly valve, and they work pretty stiff, so we put them on there to help the float work the valve.

Q You have no means, no accurate means, of knowing the amount of friction to operate that valve, nor can you say positively what the effect of those weights was so far as raising the float in the oil or above the oil?

A The man operating this trap would disconnect that and try the operation of the butterfly valve. Then he would try the operation of the float, and if the float didn't seem to have power enough he would hang weights on it.

Q But you had no means at all of knowing how far that float extended down in the oil or whether it was just barely touching the oil, did you?

A We presumed when the float would not be working the valve it would be submerged.

Q If the valve was submerged—

A You are talking about the float?

Q I mean the float—when it was submerged it would not function as a means for operating the valve, would it?

A Why, sure it would, just the same. It would have more lifting power as the submergence increased.

Q If the float was entirely submerged in the oil what effect would it have in operating the valves?

(Testimony of Thomas F. Morgan.)

A It would lift to the limit of its power, of its displacement, as much as any float would.

Q When you tried to determine the level of the oil by pulling down on the float arm, there was friction which might affect the result and there was the fact that you had a counterbalance on the outside of the float arm, both of which might have made your guess as to what the level was somewhat uncertain, or would have affected the result, wouldn't it?

A To what time are you referring?

Q At any time during the operation of Chapman No. 1 trap.

A Please read that question.

(Previous question read).

A No; you can always feel the float working in the oil.

Q If there was considerable friction it might not work very easily when you pulled down on the arm?

A But nevertheless you can feel the float in the oil no matter how much power you put on the outside. You can always feel that float in the oil when it comes back into it.

Q Are you positive you could?

A I thought I could.

Q Isn't it a fact that the only real, reliable guide to the level of the oil is the gage glass?

A No, I don't think so, particularly, because there are lots of traps that have been operated a long time without even a gage glass on them.

(Testimony of Thomas F. Morgan.)

Q Well, they had pet-cocks, or they have cocks to show the oil level, don't they, on the outside?

A The Trumble trap has no pet-cocks on it.

Q It has connections for the gage glass which can be used the same way, can't they?

A Yes; you have one at the top and one at the bottom.

Q And you can open those cocks and see the oil come out and you know whether it is above the top or above the bottom?

A Yes, that could be done.

Q When you were out at the Chapman well making those photographs, you said you could not observe the level in the gage glasses at the time you took the photographs, because they were shut off.

A Yes.

Q Why didn't you turn them on?

A They were all dirty and I didn't have time to clean them.

Q You didn't try to turn them on to see whether you could observe the level in them at the time you took the photographs, did you?

A I went up there and tried the cocks and they were all shut off.

Q Wouldn't it have required only a simple turn of those cocks to turn them and find out what the level was?

A No. The gage glasses were all dirty and covered inside with oil, and it would have been hard to determine it from that.

(Testimony of Thomas F. Morgan.)

Q You could have allowed them to blow out and then tried them, couldn't you?

A No.

Q Your judgment is it would have been useless to open the cocks on those glasses to determine the level because you thought you couldn't see through the glasses; is that correct?

A I couldn't see through the glasses.

Q And that is the reason you didn't do it?

A Yes. I wasn't particularly interested in the oil level at that time, anyhow.

Q Referring to Defendants' Exhibit TT, Chapman No. 2, you have testified that this was a companion trap to Chapman No. 1 trap.

A Yes.

Q And you said that the same level was carried as Chapman No. 1 and there was practically no difference of operation?

A Yes.

Q As to that trap, you said that you could not see the level because the gage glass was shut off, that the cocks were shut off. You didn't open the cocks on that trap, did you?

A No.

Q You made no attempt to see the level in the gage glasses?

A No.

Q It is a fact that there are also heavy weights on the float arm outside of the housing on Chapman No. 1, are there not?

(Testimony of Thomas F. Morgan.)

A I don't know. Doesn't the photograph show? Yes; there is a weight hanging on that.

Q And those are for the same purpose and have the same effect with that trap as with Chapman No. 1 trap referred to?

A I presume so, yes.

Q Regarding the oil level, you testified that the level was 6 feet 6 inches from the bottom of the trap.

A What trap do you refer to?

Q I am talking about Defendants' Exhibit TT, Chapman No. 2.

A No; I didn't say from the bottom of the trap. I gave testimony of the oil level in regard to Chapman No. 1.

Q You said it was the same as Chapman No. 1?

A Well, when that trap was open and used as a companion trap, why, the oil level was that high.

Q At that time?

A Yes, sir.

Q You testified as to that trap, as to the mode of operation and the oil level at the time it was over on Chapman No. 1; is that correct?

A Yes.

Q And what you said about the operation and the oil level as referring to Chapman No. 1 would also apply to this Trumble trap 186 now on Chapman No. 2; is that correct?

A Yes; when it was over setting as a companion trap to this No. 1.

Q At the present time, however, it is connected to Chapman No. 2, isn't it?

(Testimony of Thomas F. Morgan.)

A It has been moved; yes.

Q Was there any variation?—or I think you have testified you never observed any variation of the oil level in that trap since it has been over on Chapman No. 2. Is that correct?

A I don't believe I testified as to any oil level in this trap since it has been on Chapman No. 2.

Q You meant to testify as to that only when it was on Chapman No. 1?

A Yes.

Q You didn't observe the oil level at the time you took the pictures because the glasses were shut off, is that correct?

A Yes, sir.

Q Did you observe the condition of the glasses, whether you could see through them or not?

A I don't think you could see through them.

Q But then you were not interested in that level at that time, is that correct?

A No, I wasn't interested in that; only in showing the trap as operated on Chapman No. 1.

Q The trap on Chapman No. 5, Defendants' Exhibit RR, I understood you to say had never been in operation to your knowledge; is that correct?

A I said it hadn't been used very much.

Q When and under what circumstances was it used at all?

A The Chapman No. 5 was expected to be a big well, and this trap was placed there to take care of its production, and when it was brought in it proved

(Testimony of Thomas F. Morgan.)

to be a disappointment, so it was first placed on production and then it was taken off production, and they worked with it at different times trying to increase the production and the gas content, or the gas production of the well was small.

Q You never observed the oil level or anything in that trap, did you?

A No, sir.

Q Were you there at the time it was in operation, at any time at all?

A I may have driven by there while it was in operation.

Q Referring to the trap at Hole No. 6, Defendants' Exhibit QQ, do you know how that trap was constructed on the inside, that Hole No. 6 trap?

A No; I never saw the inside of it.

Q You have referred to the bottom of the trap just below the cone as a part of the trap, on your direct examination. Do you consider that a part of the trap? That is, the extension of the pipe down at the bottom.

A Clear out to this valve. There is a valve or stop-cock that controls it right here.

Q Do you consider that a part of the trap?

A That is the valve that controls the flow of the trap.

Q You also consider the pipe at the top part of the trap as a part of the trap?

A No.

Q Why not?

(Testimony of Thomas F. Morgan.)

A That is a pipe.

Q Isn't the bottom a pipe, too?

A Yes, sir.

Q The bottom is a part of the trap because it is a pipe, and the top is not a part of the trap because it is a pipe; is that the idea?

A This bottom here is filled all the time—it is continually full, Mr. Westall, and we speak of that as being a portion of the trap, this portion here, out to this valve.

Q As a matter of fact, isn't it equally as reasonable to consider the pipe on the top as a part of the trap as much as the pipe on the bottom as a part of it, as a matter of common sense?

A I never looked at it in that manner. When we spoke of that we spoke of the oil pipe, and the other we speak of as the leader of the trap.

Q That trap had been in use when you went on the lease in December, 1918?

A It was in use at that time; yes, sir.

Q You stated on your direct examination that the oil level is maintained at the 5-foot mark on the board shown in the photograph; is that correct?

A About that, yes, sir.

Q You also said that this level was the same in 1918. That is correct, is it?

A I think so, yes.

Q Now you said there was no gage glass.

A No.

Q And that you determined the level when you took the photographs on April 12 or 13, 1924, by pulling

(Testimony of Thomas F. Morgan.)
down on the float arm on the outside of the trap; is that correct?

A I tried it, yes. I walked up there and took hold of the float arm and worked it this way.

Q Well, did you determine the level by observing the position of the arm as it extended out from the trap?

A I told you I took ahold of the float arm and pulled it.

Q You didn't depend in any degree on the position of the arm, did you?

A You could depend on that just as well as the lifting.

Q Your testimony is that the position of that arm as extended outside of the housing would be a reliable guide to determine the oil level?

A Yes.

Q Notwithstanding weights on the arm to counterbalance the float, and notwithstanding the element of friction which might make it easy or hard to move?

A There wasn't any weight on this particular trap.

Q There was no weight on there, on this trap here?

A No, there was no weight hanging on this trap.

Q Now, there were gage cock connections on that trap, were there not?

A On this trap here?

Q Yes; that is Hole No. 6.

A Yes, there is gage glass connections on there.

Q Now a very reliable method of determining the oil level would have been simply to open the upper and

(Testimony of Thomas F. Morgan.)
then the lower gage cock connections to see whether the oil was at that level?

A There is a difference on that trap of about 20 inches between the upper and the lower gage glass.

Q Yet you could have determined it that way?

A When I told you it was around 5-foot, if you opened the top one it would show gas, and if you opened the bottom one it would show oil. There was a difference between the top and the bottom of around 20 inches.

Q You stated that there was very little variation of the oil level at that well. That has been the condition that has continued right along up to the present time?

A It seems to be.

Q Referring to Defendants' Exhibit SS, which I understand is the trap at Hole No. 18, that has a gage glass on it, hasn't it?

A Yes, sir.

Q And did you examine the oil level as it shows in that gage glass at the time you took the photographs on April 12 and 13?

A Yes.

Q Where was that oil level?

A About an inch and a half to two inches below the top of the glass.

Q That, I understand, is the normal operation of that trap, was it? That was the usual position for the oil level, is that correct?

MR. F. S. LYON: When?

MR. WESTALL: Since he first became acquainted with the trap and its mode of operation.

(Testimony of Thomas F. Morgan.)

A So far as I know, it was around there, yes.

Q And did it run higher than that sometimes, and entirely above the top of the gage glass?

A I never saw it above the top of the gage glass.

Q Did you ever see it lower than that?

A Than where it is now?

Q Yes.

A Not to my knowledge.

Q Did you observe the level very often?

A At what time?

Q During the time that you were there, from December, 1918, and on.

A I saw it at various times, yes. I made regular trips to this section of the lease.

Q Once a day?

A Oh, no, but I had daily reports of all traps and of all lines from the line-walker.

Q Written reports?

A No.

Q He made no written reports?

A Sometimes he made a written report, but ordinarily a verbal report.

Q How many of those reports did you make which included reference to the height of the oil in that trap?

A I didn't make any; I said I received them.

Q You received them, and the reports always were that the level was near the top of the gage glass?

A Of course not.

Q What were the reports in regard to the oil level of that gage glass?

(Testimony of Thomas F. Morgan.)

A He would not report anything as to the oil level on the gage glass. As long as the trap worked all right he didn't report anything about it; it was only when we had trouble that he made reports.

Q Most of the time you didn't have any trouble?

A Not a great deal; not from this trap.

Q So it was not necessary to observe the gage glass very much, was it?

A The line-walker observed that gage glass everytime he went by that trap, he observed the level.

Q From the fact that he didn't make any report that he had any trouble, you assumed that the level was where you have testified, about an inch and a half from the top of the glass all the time?

A Yes, sir.

Q And it continued at that level right along, perhaps right up to the present time; is that correct?

A Yes, sir.

Q How long is that glass, if you know?

A I judge that is an 18-inch glass. The glass itself is about 18 inches long.

Q How many times do you actually remember of observing the oil in that glass?

A I looked at it every time I went up to the trap.

Q You never at any of those times observed the level any lower than an inch and a half from the top of the glass?

A Not that I remember of; no, sir.

Q And you must have seen it dozens and dozens of times?

(Testimony of Thomas F. Morgan.)

A I wouldn't say how many times I saw it. Naturally, when you go to the lease you look at places where you have trouble, and when you make an inspection trip you drive around and look at the other places, too.

Q Now referring again for a moment to Chapman No. 1, Defendants' Exhibit UU, could you tell me by reference to that exhibit how far the gage glass connection is from the center of the row of rivets at the bottom connecting the conical portion to the cylindrical portion?

A You mean from the center of the rivets?

Q From the center of the gage glass connection.

A To the top gage glass connection?

Q No, to the lower gage glass connection.

A I cannot tell very well from this, no, but I could estimate it.

Q Would you say it was about two inches?

A You mean from the rivets or top of the plate? I judge from the top of the plate it is about an inch; not from the rivets but from the top of the plate. I haven't the correct measure here, but I judge it is around an inch from the top of the plate.

Q And it would be another inch, maybe, from the center of the rivets? It would be about two inches above the center of the rivets?

A That is a close estimation.

Q What is the diameter of the trap?

A 42 inches.

(Testimony of Thomas F. Morgan.)

Q What is the height of the trap, that cylindrical portion of the trap, between the rivet centers?

A You mean as shown here?

Q Yes.

A From 4 foot 5 to 10 foot 1, the cylindrical portion of the trap.

Q How are you arriving at those figures?

A Looking at this scale on here.

Q The scale on the board?

A Yes.

Q Now, there is a second gage glass. How high is the upper gage glass connection from the center line of the row of rivets at the bottom?

A It is 27 inches above the plate.

Q And the bottom connection of the upper glass, how far up is that?

A I don't know, Mr. Westall, how far that is.

Q Now there was a large tank, was there not, on this Chapman No. 1, used in connection with this Chapman No. 1 trap for further separating the gas from the oil on the line?

A There was a large tank between the trap and the production tank on the oil line. Is that what you refer to?

Q Yes.

A Yes, sir, there was.

Q What was that tank there for?

A To quiet the oil and to take off what gas was in solution in the oil when it came away from these traps.

(Testimony of Thomas F. Morgan.)

Q In other words, the separation of that Trumble trap was not so complete that you could rely on it entirely? You had to use that auxiliary tank?

A Those traps carry 125 to 150 pounds, and when the oil left the trap it was reduced to approximately atmosphere, so there was a lot of oil held in that gas under pressure, and when it was reduced to atmosphere, why the gas came off just like gas comes off the bottom of soda water, or anything like that, when you reduced the pressure.

Q I wish you would tell us regarding Chapman No. 1, how far above the center of the lower line of rivets the oil level was, as you have heretofore described it.

A Above the center line of the rivets? Where?

Q Above the center of the lower line of rivets connecting the cylindrical portion with the conical bottom.

A Approximately two feet.

Q Now referring to Defendants' Exhibit TT, which is Chapman No. 2 trap. What is the diameter of that trap?

A 42 inches.

Q What is the height of the cylindrical portion from rivet center to rivet center?

A It runs here from about 5 foot 9 inches to,—it looks like it might be 11 foot 7 inches or 11 foot 8, something along in there.

Q I am talking about the cylindrical portion of the trap only.

(Testimony of Thomas F. Morgan.)

Q That is what I am talking about, too.

Q The height of that cylindrical portion from rivet center to rivet center is how much?

A I said it was between 5 foot 9 to 11 foot 7.

Q To 11 foot 7?

A Yes.

Q From 5 foot 9?

A Yes, to 11 foot 7 on this scale shown on this side.

THE COURT: The scale shows the lowest point of the rivets to be 5 foot 9?

A Yes.

Q And from there on up it is 11 foot 7?

A Yes. I believe the actual measurement on that trap is approximately 68 inches.

BY MR. WESTALL:

Q The length of the cylindrical portion is 68 inches?

A Yes; the shell is 68 inches.

Q What is the length of the tapering bottom?

A 54 inches.

Q Now how many inches from the center line of the lower rivets to the bottom of the gage glass?

A We estimated that a while ago. I think we extimated it about 2 inches.

Q We were talking about Chapman No. 1, but I guess the same would apply to the other trap, it being a companion trap?

A I think they are about the same.

Q Now from the center of the lower line of rivets to the oil level would be about how many inches?

(Testimony of Thomas F. Morgan.)

A About 24 inches.

Q And from the center of the float arm to the center of the oil discharge pipe would be about how much?

A From the center of the float arm to the center of the manhole?

Q The center of the oil discharge pipe.

A Well, from the center of the manhole, which is practically the same as the center of the float arm, to the center of the discharge pipe is approximately 18 inches.

Q Now referring to Chapman No. 5, Defendants' Exhibit RR, will you please give the dimensions of that trap?

A I cannot do it; I do not know.

Q You don't know any of those dimensions?

A Not of that trap; no.

Q How did that compare in size with the other two traps; the same size?

A I don't think so. From looking at it on the photograph it doesn't look as though it would be the same trap.

Q Referring to Hole No. 6 trap, Defendants' Exhibit QQ, what was the diameter of that trap?

A Approximately 36 inches.

Q What is the height of the cylindrical portion from rivet center to rivet center?

A From the top of the bottom plate on the cone to the top of the top plate is 58-½ inches.

Q You measured the traps, did you?

(Testimony of Thomas F. Morgan.)

A Yes.

Q Now from the center row of rivets to the center of the oil discharge is how many inches ?

A I cannot figure from the center row. I can figure from the top of the cone.

Q All right.

A To the center of the oil discharge pipe?

Q Yes.

A 6 inches.

Q Now from the lower rivets center, or from the bottom of the plate to the lower gage glass cock is about what?

A About an inch.

Q And the length of the glass would be how much?

A To the center of the top opening is 20 inches from the top of the cone to the center of the top opening, 20 inches.

Q The glass itself would be an inch or so less than that?

A I presume it would be an 18-inch glass.

Q And the top of the gage glass cock to the bottom of the shell, the bottom of the plate, wou'' be about how much? The bottom of the cylindrical portion to the middle of the upper gage cock, how much would that be?

A About 20 inches.

Q Referring now to the trap at Hole 18, Defendants' Exhibit SS, what is the diameter of that trap?

(Testimony of Thomas F. Morgan.)

A 42 inches.

Q What is the height of the cylindrical portion of that trap from the bottom of the plate to the top?

A From the bottom of the cone to the top of the plate where the bumped head is is about 68 inches.

Q And each of those traps have a bumped head. Did you notice how high the bumped head was from the top of the plate in the center?

A Approximately 6 inches on Hole 18 of the Chapman lease, and on the No. 1 trap at Hole 6 it is about 5 inches.

Q What is the height of the conical bottom?

A On which trap?

Q On Hole 18.

A 39-½ inches.

Q That is not the length of the taper? It is the height of the cone, isn't it, from the apex to its center, the center of the bottom?

A That is from this point here.

Q Vertically upward?

A Yes, vertically up.

Q Now from the bottom of the glass on Hole 18 trap, the bottom portion of the cylindrical part, to the row of rivets or to the bottom of the plate, how far was that?

A Three-quarters of an inch.

Q From the bottom of the glass?

A From the center of the gage glass connection?

Q Yes.

A To the top of the cone, is three-quarters of an inch.

(Testimony of Thomas F. Morgan.)

Q Now how far would the oil level at Hole 18 be above the point of the bottom of the cylindrical portion of the trap?

A Do you refer to the top of the cone or the rivets?

Q I am referring to the top of the cone, which I believe is the same as the bottom of the cylindrical portion.

A About 18 inches.

Q It would be 18 inches to the oil level; is that correct?

A From the bottom of the gage glass?

Q From the bottom of the gage glass.

A There is about 18 inches of oil in the gage glass, in addition to that ¾ of an inch.

Q How long is that gage glass?

A Between cocks?

Q Yes.

A About 20 inches.

Q So that would bring the oil level about 2 inches from the top?

A Yes.

Q At the time you were out taking the photographs of these different traps for use in this suit, did you observe other traps on the Hole lease?

A I went over and looked at 15 and 16.

Q Did you see the trap at Hole 15?

A Yes.

Q When was that trap installed, if you know?

A That trap was put up there in August, 1919.

(Testimony of Thomas F. Morgan.)

Q Did you see the trap at Hole 16?

A Yes, sir.

Q You made no photographs of that trap?

A No.

Q And Hole No. 14?

A Yes, I saw the trap at Hole 14.

Q Did you look at that trap?

A I drove by it.

Q You didn't take any photographs or make any examination of it?

A No.

Q How about Chapman No. 4? There is a trap there. Did you make any examination of that or take any photograph of it?

A No. I didn't go up there.

Q You were familiar with the operation of those traps that I have mentioned that you didn't take any photographs of?

A Yes.

Q But not as familiar as with the ones that you have described in your former testimony?

A I am most familiar with the Chapman 1 than any of the ones we have described.

Q Chapman 8, were you familiar with that?

A Not to the extent I was familiar with Chapman 1.

Q Did you make any examination of that trap at the time you took these photographs?

A No.

(Testimony of Thomas F. Morgan.)

Q Chapman 6 and 7, there is a trap there, is there not?

A There is a trap on—there was a trap for 6 and trap for 7, both.

Q Did you make any examination of that trap when you took the photographs?

A No; that is a similar trap, I think, to Chapman 5.

Q You aren't familiar with its mode of operation?

A It sets up on a high pedestal.

Q You never observed its operation?

A When?

Q At any time.

A Surely I did, when we built the trap, and we operated it when the well came in. Chapman 7 is a good sized well.

Q Would you say that you had observed the trap at Hole 15?

A I was over there the other day when we took the pictures.

Q You didn't take any picture of it?

A No.

Q Do you know whether or not any of those traps that I have referred to which you didn't take photographs of were operated with a level on the bottom of the gage glass?

A Not Hole 15 and 16. I believe all of the gage glasses were out of those.

Q Well, one could determine the level by opening the cocks, couldn't he? Do you know whether

(Testimony of Thomas F. Morgan.)

or not in any of those wells they had a level which was down as low as the lower gage cock connection? I am talking about the traps that you didn't take photographs of.

A You mean the level as low as the lowest gage glass?

Q Yes, or below.

A I don't think there was any level that low, from the appearance of the arm, no.

Q Just from the appearance of the arm?

A Yes.

Q Did you observe about that? Did the appearance of the arm indicate that the oil level in these traps that you didn't take photographs of were substantially the same?

A As what?

Q As the ones you did take photographs of.

A I think Hole 18 is about an average trap; that was the lowest of those in operation.

Q Now do you know the construction of the trap at Chapman 4?

A The one at Chapman 4 now?

Q Yes.

A No, I don't remember what it is.

Q Chapman No. 8, did you take any particular notice of that trap when you took the photographs?

A No.

Q Did you examine the oil level in that trap?

A I didn't go near it.

Q You didn't look at the position of the float arm to determine the level, did you?

(Testimony of Thomas F. Morgan.)

A No, sir.

Q From your experience with all of these traps, would you say that the oil level was the same on that trap, Chapman 8, as it was on the other traps, on Chapman 6 and 18?

MR. F. S. LYON: We object to that question unless it is limited to a definite period of time. At the present time the witness doesn't know what it was, and it would not be material for impeachment purposes, and certainly is not cross-examination.

Q BY MR. WESTALL: At the time you were out there, that you were working there in 1918.

A There was no production there in 1918.

Q When did production begin? I am referring to Chapman No. 8.

A I don't know when that well came in; it was some time after the discovery well, of course.

Q You don't know whether it was 1919, 1920, or 1921, do you?

A No, it would be a guess as to the date.

Q Now if you carried a high oil level the difficulty was that the oil would go over in the gas.

A If the trap was filled up the oil would go over in the gas.

Q You had to be careful not to let the level get too high, didn't you?

A Surely.

Q What would result if the oil got over into the gas line?

A It would remain there until it was let out.

(Testimony of Thomas F. Morgan.)

Q Would it cause any damage?

A If it was left in there, yes, sir, it would cause damage.

Q. What damage would it cause?

A. Depending upon what the gas was used for.

Q Supposing it was used for furnaces or light, what effect would it have?

A Clog up the line.

Q And flood the furnaces sometimes, wouldn't it?

A Yes; if it was left in there, if oil and gas run on to the furnaces, surely it would flood the furnaces.

Q And it might flood the connections up to where the gas was used for illuminating purposes?

MR. F. S. LYON: We object to that as not proper cross-examination and speculative, it not being a matter that we are interested in.

THE COURT: I suppose that is self-evident. If there was enough oil in the pipe it would fill the pipe and fill every connection with it.

Q BY MR. WESTALL: That would simply clog up the pipe so that you could not get the gas; isn't that true?

MR. F. S. LYON: I object to that as not proper cross-examination, incompetent, irrelevant, and immaterial.

THE COURT: Objection sustained. That is self-evident.

Q BY MR. WESTALL: You have spoken of a device on Chapman No. 1 on the oil line. Was there

(Testimony of Thomas F. Morgan.)

any device in any gas lines connected with these traps that you have spoken of?

A Yes, sir.

Q What for?

A To catch any oil that went over. That was a standard practice, to provide drips in all gas lines.

Q I understood you to say that you never had any of these traps open on any of the wells that you have taken photographs of so that you could observe the interior construction; is that correct?

A I have seen inside of the trap at Chapman 1.

Q. The only observation you could make was through the manhole, wasn't it?

A Yes, sir.

Q You could not see the construction of the baffle plates in there, or how many there were?

A. You could see the lower end of the baffle plates; you could see the lower baffle plate, but you could not see how many there was above that.

Q. How long was the lower baffle plate with respect to the manhole?

A As I remember, it was above the top of the manhole.

Q An inch or so?

A I don't remember as to how far it was.

Q Did you ever have any difficulty with the float striking that baffle plate?

A What do you mean; the cone?

Q I mean the cone, yes.

A Not to my knowledge.

(Testimony of Thomas F. Morgan.)

Q Isn't it a fact that some of those wells, Chapman 1 or 2, or the Hole 6 or 18, that you had difficulty because the float would not rise high enough, and that you had to take out some of those lower cones?

A I think we took out what they call the pan, or something of that sort, on Chapman 1 at one time to allow the float to go higher.

Q Do you know when that was taken out?

A It was some time after the trap was put up there.

Q How long did you attempt to operate the trap before taking that pan out?

A I don't know exactly, but not long. I think when the big well came in there we had trouble pretty quick, and a portion of it was cut away at one time, and later a larger portion was cut away.

Q The purpose of cutting it away was to allow the float to go higher when there was a heavy flow of oil?

A So it was reported, yes, sir.

Q In other words, that pan prevented the valve from completely operating, didn't it?

A It prevented the float from going up to its maximum height.

(Thereupon a recess was had until 2:30 o'clock p. m.)

(Testimony of Thomas F. Morgan.)

AFTERNOON SESSION.

3 o'clock.

THOMAS F. MORGAN recalled.

CROSS EXAMINATION resumed

BY MR. WESTALL:

Q Do you know whether any of the Trumble traps furnished the Union Oil Company between the beginning of 1918 and until the time that you left your employment with the Union Oil Company were replaced by Trumbles?

A There were two traps, I believe, setting on the Chapman 3 that were replaced.

Q Do you know why they were replaced?

A I don't remember now these particular traps, why they were replaced.

Q You knew they were not satisfactory in operation, didn't you?

A Those on Chapman 3?

Q Yes.

A Those were satisfactory all right; they were doing the work.

Q Why were those traps replaced?

A I say I don't remember now why they were replaced, but they were replaced.

Q Isn't it a fact that if a gas trap does not maintain some normal oil level it would not be a good gas trap?

(Testimony of Thomas F. Morgan.)

A As long as it keeps a seal it would be a good gas trap.

Q It would have to maintain something that would be called a normal oil level, wouldn't it?

A Not necessarily.

Q If a trap would allow the oil level to vary between considerable extremes, the trap might allow the gas to escape into the gas line, might it not?

A If the trap filled up the oil would escape into the gas line; yes, sir.

Q So that there would have to be range in the upward movement of the float considerably below the danger point for safety's sake, wouldn't there?

A There always is.

Q In what condition, as to opening or closing, was the valve in those traps that you have referred to, where the level, as shown by the gage glass, was an inch and a half from the top of the gage glass?

A In what trap do you refer to?

Q Well, you have mentioned several traps, Chapman 1, Chapman 2, I believe, and Hole 6 and Hole 18, which I understand had substantially the same oil level. Referring particularly to those traps.

A On Hole 18 I think that the valve was slightly open.

Q The oil outlet was slightly open?

A Yes.

Q How about Hole 6?

A Do you mean the last time I looked at it?

(Testimony of Thomas F. Morgan.)

Q No, I mean at any time during the operation when the oil was an inch and a half from the top of the gage glass.

A I only referred to Hole 18 having the oil level an inch and a half from the top of the gage glass.

Q What was it at Hole 6?

A I referred to that to be the 5-foot mark on the photograph.

Q How far would it be from the top of the gage glass?

A From looking at this photograph it looks as if it might be any place between 3 or 4 inches below the top of the gage glass, possibly 5, but I didn't measure it; I don't know.

Q You never measured it at any time, did you?

A That Hole 6?

Q Yes.

A No.

Q That might have been much lower than that, might it not?

A I took the oil level to be about 5 foot, this 5-foot mark here.

Q When the oil level was as you have indicated, at the 5-foot mark, how far open would the outlet valve be?

A At the time I took the photograph the valve was slightly open.

Q Referring now to the other trap, Chapman No. 1, how far open would the valve be when the level was as you have indicated it?

(Testimony of C. W. Cooper.)

A It might not be open at all.

Q When the level was near the top of the gage glass would it be closed or would it be open?

A That depends upon the adjustment on the outside.

Q Do you know what that adjustment was during any of the time that you observed the operation?

A I know that when the level was as I have described it, why, it was discharging approximately the same amount of oil that was coming into it.

Q There wasn't any difference in the operation of Chapman No. 2 trap that you have referred to, in that respect, was there?

A When that trap was in close position to this one, no, the operation was practically the same.

MR. WESTALL: I think that is all.

MR. F. S. LYON: That is all, Mr. Morgan.

C. W. COOPER,

called as a witness on behalf of the Defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. F. S. LYON:

Q What is your name?

A C. W. Cooper.

Q What is your business, Mr. Cooper?

A Salesman.

Q For whom?

A William C. Rae.

(Testimony of C. W. Cooper.)

Q Mr. William C. Rae has the sale of the Trumble gas traps?

A He is the sales manager; yes, sir.

Q Are you familiar with Trumble gas traps?

A Yes, sir.

Q Have you recently made a trip to the so-called West Side oil fields about Taft, California?

A Yes, sir.

Q For what purpose?

A Inspecting Trumble gas traps in operation.

Q You, as I understand it, have been for some time familiar with the operation of Trumble gas traps?

A Yes, sir.

Q Did you recently take photographs of a number of Trumble gas traps in the West Side fields near Taft?

A Yes, sir.

Q With Mr. Bailey?

A With Mr. Bailey; yes, sir.

Q The gentleman who has heretofore testified?

A Yes, sir.

Q Did you take the measurements of such traps?

A Yes, sir.

Q I now show you a sheet of paper containing two photographs and some typewritten matter at the top.

MR. WESTALL: We object to counsel showing the witness typewriting as leading.

Q BY MR. F. S. LYON: Please state whether or not you took these photographs, and, if you know,

(Testimony of C. W. Cooper.)
who placed the typewritten matter upon this sheet of paper.

A I took these photographs, and I also put the typewriting on this paper.

Q Of what are these two photographs?

A That is a No. 1 Trumble gas trap on the El Dora Oil Company lease, Maricopa Flat.

Q What serial number of trap?

A No. 126.

Q From what did you put these measurements upon this sheet of paper?

A From a steel tape, also a stadia-rod made by the Lufkin Rule Company.

Q Were these measurements all taken by yourself?

A Yes, sir.

Q And the photographs were taken when?

A These were taken two weeks ago today, the 15th of April.

Q Was the trap in operation at the time?

A Yes, sir.

Q Are the measurements given on this sheet correct?

A Yes, sir.

Q Along the side of the photograph appear marks. What is that mark?

A That is a transit rod, or a stadia-rod, made by the Lufkin Rule Company for surveyor's use.

Q And it is graduated how?

A Tenths and feet.

(Testimony of C. W. Cooper.)

Q In feet and tenths of feet?

A In feet and tenths of feet.

Q What means did you take at that time to ascertain the level of oil carried in this particular trap at the time you took those photographs?

A In that particular trap the oil level was shown in the gage glass as marked there in white paint on the side of the trap.

Q And the mark on the side of the trap in white paint, including the word "Oil", shows the oil level as carried in that trap at that time?

A In that particular trap at that time; yes, sir.

Q And when was that?

A That was the 15th of April.

Q 1924?

A 1924.

Q And the float arm shows the position of the float arm in this particular trap at that time?

A Yes, sir; the outside float arm.

MR. F. S. LYON: We offer this photograph in evidence as Defendants' Exhibit CC.

Q Do you know, Mr. Cooper, what gravity of oil was being run through this trap at the time the photograph was taken?

A The gravity of the oil in that section is about 21 gravity. This particular trap was handling about 200 barrels of oil and 400 barrels of water, and I think that would bring the gravity of the oil to about 14 gravity, but I am not sure.

(Testimony of C. W. Cooper.)

Q I show you two other sheets of paper, one of them containing two photographs and one of them containing one, and marked respectively Defendants' Exhibits WW and VV for Identification. What are they?

A Exhibit WW is photographs of No. 1 Trumble gas trap on the St. Helens Petroleum Company's well No. 3, Section 22, known as the Schultz lease in Taft. That is trap No. 120. Exhibit VV is a No. 1 trap shown on Well No. 2 of the same lease, the St. Helens Petroleum Company lease at Taft.

Q Serial number what?

A 144.

Q And was the typewriting on this sheet of paper also placed thereon by you?

A Yes, sir.

Q And from what?

A From notes made in the field at that time.

Q At the time you have referred to of inspecting and photographing the traps?

A Yes, sir.

Q Do they correctly represent the dimensions and distances stated?

A Yes, sir.

Q On the side of this trap is the same Lufkin rule or measuring device you have referred to, is there?

A Yes, sir.

MR. F. S. LYON: We offer these in evidence as Defendants' Exhibits WW and VV, respectively. I

(Testimony of C. W. Cooper.)

don't think they have been formally offered before, but they have been marked.

Q I now show you another sheet containing two photographs of a trap and some typewriting. Please similarly state what these are.

A This is a picture of a No. 2 trap at the Union Oil Company's Interstate lease on Maricopa Flat, Well No. 4, trap No. 148.

Q And the typewriting thereon is what?

A It is measurements taken by myself in the field and put on this paper by myself.

Q The measurements were taken at the time the picture was taken?

A At the time the photograph was taken, yes, sir.

Q Does this trap show the same measuring device you have referred to?

A Yes, sir.

Q This trap was also in use at the time?

A Yes, sir.

Q Where was the oil level in that trap as regards the extension of the trap from top to bottom?

A It was about half way on the manhole.

Q And that would be how far from the bottom of the trap to the oil level?

A From the bottom of the cone to the oil level would be about 5 feet.

Q And from that point to the top of the trap would be what?

A From the center of the manhole to the top of the trap is 3 feet 3 inches.

(Testimony of C. W. Cooper.)

MR. F. S. LYON: We offer this in evidence as Defendants' Exhibit BB.

Q I show you another sheet of paper containing two photographs with typewriting thereon. Please state what these are.

A This is a photograph of a No. 1 Trumble trap on the Midway Northern Well No. 4, Section 32, Maricopa Flat, and this particular trap is No. 125.

Q Was the trap in operation when you examined it?

A Yes, sir.

Q And this is the same *trip* that you have referred to?

A Yes, sir.

Q And were these measurements that are on this sheet of paper taken by you?

A Yes, sir.

Q And were they placed on the paper by you?

A Yes, sir.

Q Are they true and correct?

A Absolutely.

Q I believe the information gives the measurements from the top of the trap to top of the cone, and the oil level as carried at that time, and so forth.

A So far as you can tell from the outside of the trap. We didn't tear the traps down that were in operation.

Q In this particular installation how far below the extreme end of the cone proper is the stand-pipe forming a part of the receptacle of the trap extended?

(Testimony of C. W. Cooper.)

A To the center of the tee where the sand or water is drawn off would be about 17 inches.

Q And that forms an extension below the bottom of the cone indicated in your measurements on this paper?

A Yes, sir.

Q Do you consider that that hollow space in such stand-pipe is effectively an operative portion of the trap?

A Well, it gives you a little more space for the sand to settle, is all.

MR. F. S. LYON: We offer this in evidence as Defendants' Exhibit AA.

Q I show you another similar sheet of paper with two photographs thereon, and will ask you to state what that is a photograph of and how the typewriting came upon this sheet.

A This is a photograph of a No. 1 Trumble trap on the Midway Northern Oil Company's lease, Section 32, Maricopa Flat, Well No. 6. It is trap No. 134. This typewriting on this sheet was put on there by myself from notes taken in the field when the photograph was taken.

Q And when was that?

A On the 15th or 16th of April, 1924.

Q Was the trap in operation at the time?

A Not this particular trap; no, sir.

Q And the same measuring device was used and is shown in the photograph?

A Yes, sir.

(Testimony of C. W. Cooper.)

MR. F. S. LYON: We offer this in evidence as Defendants' Exhibit A-3.

Q I show you another similar sheet of paper with two photographs on. What have you to say in regard to that?

A That is a picture of a No. 1 Trumble trap on the Trojan Oil Company's lease, Section 32, Maricopa Flat, trap No. 181, and this typewriting is the same as the other sheets.

Q Those measurements are correct measurements and were taken by you at the time?

A Yes, sir.

Q And correctly represent the construction of that trap?

A Yes, sir.

Q Was the trap in use at the time?

A Yes, sir.

Q And the same measuring device is shown in the photograph?

A The same.

Q In that trap from the bottom of the cone to the oil level as carried in the trap at the time it was what?

A As near as I could tell, about 5 feet.

Q And from such oil level to the top of the trap was what?

A 3 feet 3 inches.

MR. F. S. LYON: We offer this in evidence as Defendants' Exhibit A-4.

(Testimony of C. W. Cooper.)

Q Similarly, I show you another sheet containing two photographs and typewritten matter. State what it is.

A This is a picture of a No. 3 Trumble trap on the Honolulu Consolidated Oil Company's lease on Section 6, Well No. 48, trap No. 112.

Q Taken on this same trip?

A Yes, sir.

Q Was the trap in operation?

A Yes, sir.

Q And do the measurements and data at the top of this sheet correctly delineate the measurements and data observed by you at that time in regard to this trap?

A Yes, sir, it does.

MR. F. S. LYON: We offer this in evidence as Defendants' Exhibit A-5.

Q I hand you another sheet containing two photographs and typewritten matter. Please state what those photographs are, and who put the typewritten matter on the sheet, and what it is.

A This is photographs of a No. 1 Trumble trap on the Honolulu Consolidated Oil Company's lease on Section 6, Well No. 79, Trap No. 113. These measurements typewritten on here are what I took from the trap in the field.

Q And typewritten on there by you?

A Yes, sir.

Q And this was on the same trip you have been referring to?

(Testimony of C. W. Cooper.)

A Yes, sir.

Q And the matter is correctly set forth there?

A So far as I know; yes, sir.

MR. F. S. LYON: I offer this in evidence as Defendants' Exhibit A-6.

Q I believe you stated this last trap was still in use at the time.

A Yes, sir.

Q I show you another sheet with a photograph thereon and some typewritten matter . State what it is.

A This is a photograph of a No. 1 Trumble trap on Well 22, Section 8, of the Honolulu Consolidated Oil Company. These typewritten figures are measurements of the trap and placed on this paper by myself. This is trap 115.

Q And was this photograph taken at the same time as the others?

A Yes, sir.

Q And is the matter therein stated as to dimensions, figures, and so forth, correct as taken by you at that time?

A Yes, sir.

Q From the trap?

A From the trap.

Q Was this trap in operation at the time?

A Yes, sir.

MR. F. S. LYON: We offer this in evidence as Defendants' Exhibit A-7.

(Testimony of C. W. Cooper.)

Q Now in making this trip to the oil fields to take these photographs did you take with you any blueprint of the Trumble Gas Trap Company?

A I did.

Q Have you that blueprint?

A Yes, sir.

Q Please produce it.

(Witness produces blueprint).

Q I note that this blueprint is numbered T. W. 107. What use, Mr. Cooper, did you make of this blueprint on that trip?

A We used this blueprint to check our measurements, to see that they were correct with the blueprint.

MR. F. S. LYON: In order to avoid unnecessary duplication of the record, Mr. Westall, I will ask you to take the print Defendants' Exhibit YY, which is a duplicate print of this, and inspect it, and if you have no objection I would like the record simply to show it is a duplicate of Exhibit YY.

MR. WESTALL: I don't find any difference.

MR. F. S. LYON: Of course Exhibit YY has the cross-marks on it, Mr. Westall, that Mr. Townsend put on.

MR. WESTALL: Yes.

Q BY MR. F. S. LYON: How did you find, Mr. Cooper, that these traps that you have referred to checked with this blueprint Defendants' Exhibit YY?

A Did I find that they checked?

(Testimony of C. W. Cooper.)

Q How did the measurements compare with the blueprint?

A Practically the same.

Q Are you familiar with the number, approximately, of Trumble gas traps that are in the West Side field around Taft?

A I could estimate fairly close.

Q How many of them did you actually count?

A I counted about 35 on this trip, but I didn't take in the whole field.

Q 35 of them actually installed there at the present time?

A Yes, sir.

Q What proportion of them were of the same type as this print Defendants' Exhibit YY?

A They were practically all that same style trap.

Q Did you see any Lorraine traps in the West Side field on that trip?

A I did.

Q How many?

A 15.

MR. F. S. LYON: You may take the witness, Mr. Westall.

CROSS EXAMINATION

BY MR. WESTALL:

Q I notice at the top of the paper and photographs marked Defendants' Exhibit AA a statement that this trap was shipped to the Spreckels Oil Company, Maricopa, California, October 8, 1914, Order

(Testimony of C. W. Cooper.)

No. 34, and transferred to the Midland Northern Oil Company. Did you put that on there?

A Yes, sir.

Q Where did you get the data to enable you to make that statement?

A From the shipping records in the office of the Trumble Gas Trap Company.

MR. F. S. LYON: I would say for your information, Mr. Westall, and the Court's information, that I checked these descriptions with the witness Gutzler when he was on the stand, that portion of these particular exhibits.

THE WITNESS: Those were made from the same records Mr. Gutzler testified to.

MR. WESTALL: We object to the statement on there as not the best evidence. We would like an opportunity to look at the records sometime or other.

MR. F. S. LYON: They are here.

MR. WESTALL: Anyway, we would like to save that objection.

MR. F. S. LYON: That portion was put on there simply for the convenience of the court so that you might have it before you, and you will find it in the testimony of Mr. Gutzler. We offer to file the original shipping records with all this testimony.

Q BY MR. WESTALL: When did you first see this trap referred to here, shown in Defendants' Exhibit AA?

A I couldn't say for sure; but I was located in the Midway field for the last twelve years, and it was my

(Testimony of C. W. Cooper.)

business to visit all of these leases. I have seen the traps for years, in fact I sold them before I went with Mr. Rae for several years. I couldn't say at this time when I first saw that trap.

Q Still referring to the same exhibit, you might not have seen that trap until 1918 or 1919, might you not?

A Possibly.

Q You haven't any recollection of when you first saw it?

A No, sir.

Q You might not have seen it until 1920, to examine it critically?

A I wouldn't say that I examined it particularly. I have seen traps and have sold them for several years, Trumble traps.

Q But this particular trap you have no recollection of having seen or examined until the time that you took these photographs?

A Not to examine it; no, sir.

Q That was the first time that you ever recall observing the oil level in this particular trap, Defendants' Exhibit AA?

A Yes, sir.

Q Did you observe the oil level in this trap, Defendants' Exhibit AA, at the time you took the photographs?

A No, sir.

Q You don't know where the oil level was?

A Only from the float arm.

(Testimony of C. W. Cooper.)

Q Was there any weights on the float arm or connections?

A Not that I remember. If you will let me see the picture I will tell you. There was not.

Q You don't know whether the float was submerged in the oil, or rested in the oil?

A I imagine it was submerged up to a certain point, according to the gravity of the oil.

Q You haven't any other means other than just a mere guess, of saying that it rested on the oil or was submerged to any extent?

A I know that it was submerged some in the oil, from past experience with traps; but with this particular one, no.

Q You haven't any means of knowing with that particular trap how much it was submerged in the oil, have you?

A No.

Q And did you determine the oil level by observing this float arm?

A I took the oil level to be where they generally carry it, at the middle of the manhole plate, and the float arm shows exactly just about horizontally straight across.

Q And being straight across, you were assuming that the float that was on the opposite end was in a horizontal location and that therefore the oil level was about the center of the manhole?

A Yes, sir.

(Testimony of C. W. Cooper.)

Q Isn't it a fact that in some of *thos* traps they had a bent-down float arm inside of the trap or had it bent up?

A They may have.

Q For all you know that float arm inside of the trap might have been bent down, might it not?

A It might have; yes, sir.

Q If that were so, then the horizontal position of the float arm outside of the trap would be no indication of the oil level?

A It would all depend upon how the adjustments on the outside were set by the man running the trap.

Q That would be true, but it would also depend upon the position of the bending of the arm inside of the trap?

A I don't know.

Q You wouldn't say about that?

A No.

Q Referring again to Defendants' Exhibit AA, let me ask you, when the float arm was horizontal, as shown in this photograph, and you assumed that the oil level was about the center of the manhole, how far open would the oil outlet discharge valve be?

A That would all depend upon how much oil was being put into the trap from the well; it would be open just enough to let that much oil out.

Q Would it be half way open?

A I don't know; it would depend upon how much oil was coming in.

Q There would be no means of determining?

(Testimony of C. W. Cooper.)

A No; it all depends on the oil.

Q Now referring to Defendants' Exhibit BB, did you observe the oil level at the time you took that photograph?

A No, sir.

Q You don't know what the oil level was at that particular trap at the time you took the photograph?

A I know it was above the outlet, that is all I know. There was an oil seal in there.

Q This has a Klipfel valve on it, hasn't it?

A Yes, sir.

Q The oil outlet was the pipe just behind this globular portion of the valve, wasn't it?

A Yes, sir.

Q About how far was that oil outlet from the bottom of the cylindrical portion of the trap?

A If you will give me that blueprint, T. W. 107, I think I can tell you. 7-½ inches to the center of the pipe.

Q To the center of the pipe. How long was the gage glass?

A I think those gage glasses are 18 inches long, the glass itself.

Q Can you tell the location of the gage glass with respect to the bottom of the cylindrical portion?

A The bottom of the gage cock was about 2 inches above the center of the bottom row of rivets.

Q That is shown on the blueprint to be 2 inches?

A The center gage cock. The glass would be about 7/8 of an inch or an inch higher than that.

(Testimony of C. W. Cooper.)

Q You took no means at all of observing the oil level either by the gage glass or any other means on this trap shown in Defendants' Exhibit BB?

A I didn't tamper with the trap at all. I simply got a chance to take the pictures; I didn't touch the trap.

Q You don't know whether the oil level was at the bottom or at the top of the glass, or below the glass, do you?

A I know it was above the bottom of the glass, because there was oil in the bottom of that glass, and that shows that you have a seal there or the gas would go out of your trap.

Q Could your level have been above the top of the conical bottom, which is below the bottom of the gage glass, and still have a seal there?

A Not a practical seal, no, sir; it would be below the oil outlet.

Q When did you say you took those photographs? On the 15th of April?

A Two weeks ago today.

Q Before that time when did you ever see this trap as shown in Defendants' Exhibit BB?

A I don't know when I did see that trap first. That is another trap located in the Maricopa Flats where I have been visiting and going over the ground for years.

Q You could not say positively that you ever saw it?

(Testimony of C. W. Cooper.)

A Not that identical trap; no, sir.

Q Of course you have no knowledge as to where the oil level was maintained at any time since the time that trap was first installed?

A For the practical working of it, it would have to be above the oil outlet.

Q You could set that trap so that the oil level would be in the lower part of the gage glass and make your seal, referring to Defendants' Exhibit BB?

A No, sir.

Q You couldn't do that?

A Not and have an effective oil seal; no, sir.

Q You could have it set at least in the lower half of the gage glass and have a seal?

Q You could have the valve wide open and let the oil go right through the trap without a seal, if you wanted to.

Q Did I understand you to say that the oil level in traps like this was about the center of the manhole?

A I imagine so; yes, sir.

Q Still referring to Defendants' Exhibit BB, if that oil level was as you say at the center of the manhole, it would be entirely above the top of the gage glass, wouldn't it?

A No, sir; it would just be to the top of the end of the gage glass.

Q So that the gage glass would perform no function at all as to indicating the level of the oil?

(Testimony of C. W. Cooper.)

A It would indicate that you had an oil seal in the trap.

Q That is all it would indicate. It would not indicate how much above that it was, would it? It would not be any means of determining, I mean, how far above the gage glass the level was?

A It is not necessary to know that so long as the trap is working perfectly.

Q You say it was customary to carry your oil level up above, or up at the very top of the gage glass, so that there is no indication given by the gage glass of the level?

A I did not.

Q Well, you said it was usual to carry it about the center of the manhole.

A I don't think so.

Q On this particular trap?

A Not on this particular trap, on any of the traps.

Q On this particular style of trap I am referring to, that is, Defendants' Exhibit YY.

A That is about where they generally carry it, yes. That gives you a good oil seal.

Q Under that customary practice, then, your gage glass is of no effect at all so far as indicating the level, except as indicating that the level is somewhere above the gage glass; is that correct?

A As I understand it, the principal function of the gage glass is to be sure that you have an oil seal in your trap. Other than that it doesn't make a whole lot of difference.

(Testimony of C. W. Cooper.)

Q Now, referring to Defendants' Exhibit CC, when did you first observe that trap?

A I don't know..

Q You haven't any recollection of ever having seen the trap or observed its operation prior to the time that you took the photographs on or about April 15, have you?

A I couldn't say for sure; no, sir.

Q. The only time that you observed the oil level was at the time you took the photograph?

A Yes, sir.

Q How did you determine that the oil level was as indicated on this Defendants' Exhibit CC, and as you have marked it?

A On that particular trap it showed in the gage glass.

Q Well, now, I call your attention to the fact that the oil level as indicated on this photograph, Defendants' Exhibit CC, is not higher than the bottom of the manhole as you have indicated.

A Yes, it is. Here is the manhole down here. It is higher than the bottom of the manhole, if you will look close.

Q If it is any higher, it is a very small amount higher than the bottom of the manhole?

A On that particular rod it measures practically 4/10 of one foot higher.

MR. F. S. LYON: In other words, over 4 inches?

A Yes, sir. .4 of one foot.

(Testimony of C. W. Cooper.)

Q BY MR. WESTALL: I call your attention to the fact that the float arm extending outside of the trap is pointing downward, instead of extending horizontally it is slightly downward.

A Yes, sir.

Q That would seem to indicate that the float was probably barely touching the top of the oil, wouldn't it?

A Not necessarily, no, sir.

Q Because the float arm might be bent down inside of the trap?

A It might be; I don't know.

Q. It might also be bent upward?

A It might.

Q You haven't any means of knowing whether it is bent downward or upward, from an inspection of the trap on the outside?

A No, sir.

Q Referring to Defendants' Exhibit A-3, when did you first see that trap?

A I couldn't say for sure. I might have seen this trap on the original lease, the St. Lawrence, but I don't know.

Q So far as your recollection goes, you never saw it in actual operation until the time that you took the photographs on April 15 last?

A It was not in operation at that particular time.

Q It was not in operation?

A No, sir. The well was dead.

Q So you had no opportunity of seeing any oil level indication on this particular trap at any time?

(Testimony of C. W. Cooper.)

A No, sir.

Q Now referring to Defendants' Exhibit A-4, was this trap in operation at the time you took this photograph?

A It was.

Q When did you first see that trap?

A I don't know.

Q You have no recollection of having seen that trap in operation at any time before you took the photograph on April 15 last?

A I don't remember it, no. That is another case like the others. It has been there for several years, and I have been over those fields and I might have seen it and might not.

Q Now this has a "T" on there. What does that indicate?

A It means Trojan Oil Company. That is a mark of mine that I put on there to identify the trap in the picture.

Q Did you observe any indication of the oil level at the time you took the photograph?

A This particular trap I think the oil level was just above the rivets and below the center of the manhole?

Q Just above the rivets?

A Just between the rivets and the manhole plate and the center of the float axle. They have a double float axle on there, so it is pretty hard to tell.

(Testimony of C. W. Cooper.)

Q The float arm is extended outside at a very sharp angle, perhaps an angle of 22 degrees or more?

A I would say 20 degrees.

Q Upward?

A Yes, sir.

Q At the outer end?

A Yes, sir.

Q That would indicate that the float was probably about at the line of connection between the cylindrical portion and the conical bottom?

A Not necessarily; no, sir.

Q You think it might have been slightly above that?

A It might have been bent up; also there is very light oil in the Trojan when there is no water.

Q Did you observe the oil level in that particular trap?

A I did; it was practically even with the float arm.

Q How far up would the oil level be as indicated by the gage glass on this Defendants' Exhibit A-4?

A Right in here (indicating).

Q Along about the center of the manhole?

A Practicallv the center of the manhole there; but I imagine it is above the center of the manhole at times.

Q Then if it was as you have indicated, near the center of the manhole, it would be above the top of the gage glass or even with the top of the gage glass?

A Yes.

(Testimony of C. W. Cooper.)

Q The only way you can account for the extreme angle of that float arm is that the float arm inside must have been bent?

A It might have.

Q Would it be possible for it to have that position outside of the trap unless it was bent on the inside?

A It might be, yes. The valve might have been so that the float couldn't raise any further. You will notice here that the adjustment is down very low on the outside.

Q Have you any means of determining from the outside of this trap from this photograph how much the valve is open at the time the oil level was as you have indicated?

A The valve would be open just enough to let the amount of oil escape from the trap as was coming into it.

Q Are you familiar with the traps made and sold by the Trumble Gas Trap Company used in the fields around Los Angeles?

A Yes, sir.

Q You are quite familiar with the operation of all of those traps?

A Yes, sir.

Q You think it is the usual customary practice to carry your oil level at the top or above the top of the gage glass?

A I didn't say that at all.

Q. Well, do you say that?

(Testimony of C. W. Cooper.)

A It makes no difference so long as the trap is operating.

Q I am not asking you whether it makes any difference or not. I am asking whether it is or is not the custom.

A I don't know.

MR. F. S. LYON: We object to that on the ground it is not cross-examination. Counsel is making the witness his own. We have only proved by this witness certain photographs and the conditions in regard to them.

MR. WESTALL: The witness has testified regarding the usual practice with respect to the oil level.

MR. F. S. LYON: Not on direct examination.

THE COURT: Objection sustained.

MR. WESTALL: Note an exception.

Q BY MR. WESTALL: Now referring to Defendants' Exhibit A-5, was that trap in operation at the time you took the photographs on April 15?

A Yes, sir.

Q When did you first have an opportunity of seeing that trap in operation?

A To be exact of knowing, I seen this particular trap in operation the day I took the picture; to be absolutely sure, that is the day I saw it in operation.

Q You don't remember of ever having seen it in operation prior to that time?

A I didn't make it a habit of watching particular traps prior to that time.

(Testimony of C. W. Cooper.)

Q Have you indicated on this trap, Defendants' Exhibit A-5, the oil level?

A No, sir.

Q Did you observe at the time you were out there the oil level?

A No, sir; I didn't see it on the glass, and I didn't touch it to find out.

Q So you don't know where the oil level was at the time you took this photograph of Defendants' Exhibit A-5?

A I couldn't say exactly, but it was about the center of the manhole, according to the looks of that float arm; everything being equal, the float arm being straight, it would be about the center of the manhole.

Q Assuming that the float arm was not bent?

A Yes, sir.

Q You have made no effort to find out what the level was at the time you took the photograph?

A I didn't touch the trap at all; no, sir.

Q Referring to Defendants' Exhibit A-6, when did you first have an opportunity of seeing that trap?

A I don't know. The first opportunity I had of seeing the trap was when I took the picture, that I can positively identify.

Q At the time you took the picture did you observe the oil level?

A No, sir; it didn't show.

Q. Did you examine the gage glass?

A I looked at the gage glass, but it didn't show on the gage glass. I didn't touch the trap to find out.

(Testimony of C. W. Cooper.)

Q. So you haven't any idea from any personal examination of the trap at that time where the oil level was?

A. No, sir.

Q Was it part of your instructions when you went out to take these photographs to observe the oil levels?

A If possible, yes, sir.

Q Now referring to Defendants' Exhibit A-7, when did you first see that trap in operation?

A To positively identify it in operation was the same day I took this picture.

Q April 15. Did you observe the oil level in the trap at that time?

A The glass was full of oil, but whether it was working or not I don't know.

Q Then you don't know what the oil level was?

A I know it must have been at the top of the gage glass anyway.

Q You assume that; you don't know it from any examination?

A I didn't touch the traps while they were operating; I didn't open the gage cocks.

Q You could have opened the cocks on the gage glass and observed it?

A It would not have been good policy to do that unless you got the permission of the superintendent to touch any trap.

Q You had no opportunity of observing what the level in that trap was?

(Testimony of C. W. Cooper.)

A No, sir.

Q Referring to Defendants' Exhibit WW, when did you first have an opportunity of seeing that trap in operation?

A The first time that I saw this trap in operation to positively know of was when I took this picture.

Q On April 15, 1924?

A Yes, sir.

Q Did you observe the oil level in that trap at that time?

A Up at the top of the gage glass.

Q Did you examine those cocks to see whether those cocks were opened or closed?

A No, sir.

Q So far as you know, this glass might have been filled with oil and the cocks closed?

A They might have; I don't know.

Q Of course that would make the gage glass totally inoperative as a means for determining the oil level?

A It might.

Q You didn't try the gage cocks to see whether they were open or not?

A No, sir.

Q Did you attempt to determine the level of the oil by any examination of the float arm?

A No, sir.

Q You didn't try the float arm to see what the level was?

A No, sir.

(Testimony of C. W. Cooper.)

Q So you have no means of knowing or estimating, except your past experience, what the oil level in the trap shown in Defendants' Exhibit WW was?

A Only your float arm.

Q And the float arm might have been bent inside of the trap so that would not have been any sure indication?

A No, not sure; but they don't bend those float arms very often, unless it is to carry a higher level. They never bend them to carry a lower level, that I have seen.

Q How many of those traps that are sent out have you examined the interior of?

A I have given service on several Trumble traps in the Southern California fields.

Q They have sent out hundreds, and out of those hundreds you have only examined several?

A Yes, sir.

Q You have no knowledge of whether the float arms are bent or whether they are not bent in those hundreds of traps, except those several you have examined?

A I think the policy is to send them out straight.

Q You only think that is the policy. Referring now to Defendants' Exhibit VV, when did you first have an opportunity to see that trap in operation?

A To know positively that I saw this particular trap in operation was the day I took this picture.

Q Did you observe the oil level at the time you took the photograph?

(Testimony of C. W. Cooper.)

A It was at the top of the glass. I also put my hand on the top of the trap, and you could tell by the temperature. That is very hot oil in that field and you can tell by the temperature of the trap just about where it is.

Q Did you look at the gage glass to see where the level was?

A No.

Q What level of the oil was indicated by the gage glass?

A Up at the top of the glass.

Q Was it above the top of the glass?

A I don't know; it was about the top.

Q You don't know whether it was a little bit lower than the top of the glass, do you?

A Not much lower. It might fluctuate with the heavier oil or the gas.

Q At the time you looked at it it was full of oil, was it?

A Well, I didn't spend much time looking at it.

Q At the time you examined it are you sure those gage cocks were open?

A That particular trap, yes, sir.

Q You tried them to see if they were open?

A You could see the oil moving in the glass.

Q Then the oil level must have been a little below the top of the glass?

A Yes. If you will ever notice in a gage glass when the well is flowing the oil will be moving up and down with the flow of the well. It fluctuates. It

(Testimony of C. W. Cooper.)

might have been above that or there might have been a little gas pocket in there which would get in and blow your oil down in the glass for a minute, but it will come back again. I think your float arm is shown practically straight across with the axle of your float.

Q It is rather difficult to say where the float arm is in that photograph, isn't it?

A You can see it there. There is your float arm right there, straight out on your float axle, and this is your connecting link.

Q You can't tell whether it is horizontal, can you?

A I think you can if you look close.

Q It is because you are looking directly at the end of it, isn't it?

A Because I happened to see it when I took the picture I know it is that way. It is not at an angle. You see, this would be off center if it was at an angle.

Q You have referred to a certain bottom connection of the trap and said that you considered it a part of the trap.

A I didn't say I considered it a part of the trap.

Q When these traps are sent out for sale are the connections at the bottom sent with them?

A There is a 6-inch coupling welded in the bottom of that particular trap.

Q And the trap ends with the bottom of that 6-inch coupling; is that correct?

A When it is sent out that is the way it is sent; yes, sir. But when it is set up they have to put a tee

(Testimony of C. W. Cooper.)
or an L or some sort of coupling or a nipple on the trap.

Q Do you consider that nipple or tee a part of the trap?

A When it is connected up. It wouldn't work without it.

Q So also the pipes at the top of the trap, the outlet pipes in the top of the trap, would be part of the trap, too, wouldn't they?

A Not necessarily any more than I would consider the pipe from the well a part too.

Q In one sense all of those pipes are part of the trap; is that correct?

A They are necessary to the working of a trap regardless of whether it is Trumble's or whose it is.

Q But strictly speaking, you would consider the trap only the part that is made say by the Trumble Company and not those connections at the bottom or top; isn't that true?

A I don't know what I would consider as part of the trap. I never took that into consideration at all.

Q While they have that 6-inch collar at the bottom of the trap as part of the trap and they don't have any nipple or tee down here when they sell the trap, it is a fact that these traps have this extension at the top, don't they, a considerable portion above?

A No, sir. I think it is an 8-inch by 4-inch swedge nipple welded into the trap. It is just simply a mode of letting the oil into the trap.

MR. WESTALL: That is all.

(Testimony of C. W. Cooper.)

REDIRECT EXAMINATION

BY MR. F. S. LYON:

Q How long, Mr. Cooper, did you say that you had been familiar with the use of Trumble gas traps in the West Side field near Taft, California?

A I have sold traps through the California National Supply Company in the West Side field since 1918.

Q And in selecting these particular traps for photographing, the ones of which exhibits have been offered here in evidence today and have been identified by you, did you pick out special traps, or what?

A No, sir. I just took the traps as I came to them. A lot of traps that I inspected I didn't take any photographs of.

Q You went after particularly the older traps?

A The older style traps, yes, sir.

Q And you had no authority to change or alter the working conditions of those traps, had you?

A I didn't ask for any and I had none.

Q What have you to say with regard to the showing of the float arms and levers, etc., as indicating the same general condition or a different condition from those of the other older traps of the Trumble manufacture that are in the West Side field?

A Do you mean what is the general condition of all float arms?

Q Yes.

A They are just about the same. Some of them will be a little tilted up and some of them might be

(Testimony of C. W. Cooper.)

down a little, but practically horizontal. Practically all that I inspected were horizontal.

Q And what is the purpose of the adjusting devices in connection with the float arm on the older Trumble traps?

A So that the operator might carry an oil seal where he thinks it best to operate any particular well.

Q From your experience with gas traps, what other object could there be than the oil seal in having any given amount of oil retained in the trap at any given time?

A None that I know of.

MR. F. S. LYON: You may take the witness, Mr. Westall.

RECROSS EXAMINATION.

BY MR. WESTALL:

Q Did you ever have any trouble with sand?

A What do you mean by any trouble?

Q That is, cutting out valves.

A It happens sometimes on all traps. It is according to the well and how much sand it is making and how it is handled.

Q With these Trumble traps illustrated in the photographs that you took, or traps of a similar construction, was there trouble with the valves cutting out?

A I don't know. I had nothing to do with connecting or working that particular kind of traps. I used to sell this particular trap, but it was before I went with Mr. Rae as salesman.

(Testimony of C. W. Cooper.)

Q And you don't know what troubles the users had with these old Trumble traps made in 1915 and 1916, do you?

A No, sir.

Q Do you know of any instances where they had trouble with sand?

A Not any more than they do today with any trap.

MR. WESTALL: That is all.

REDIRECT EXAMINATION

BY MR. F. S. LYON:

Q Just what do you mean, Mr. Cooper, by your last answer "not any more than with any of the other traps"?

A Well, I might say that in the traps today the sand trouble is more or less. If a well makes lots of sand, it is necessary for a man to be there to keep that sand drained off, otherwise the sand will fill up and get into your outlet lines and valves and clog the whole works and the trap will not work.

Q Is there any way by which you can tell when an oil well is going to make sand or when it is not going to?

A No, sir, not that I know of.

Q BY MR. WESTALL: Could you say as to how many of these old style traps made in 1915 and 1916 you sold, approximately?

A No, sir; I didn't say I sold any made in 1915 and 1916. I said I sold them in 1918 and 1919.

Q This same kind of traps?

(Testimony of C. W. Cooper.)

A Practically that same style, with the conical bottom mounted on what you might call a stand-pipe.

Q And what kind of valves did they have?

A I don't remember.

Q Did some of them have butterfly valves?

A Some of them I think had a Klipfel valve, and I think some slide valves.

Q If there was trouble with those traps would you know about it?

A I suppose I would. If there was trouble they would probably come back to us for replacements, and at the time I was with the company I didn't replace any valves or sell them any valves that I remember of.

Q Then is it a fact that those traps gave good satisfaction?

A So far as I know the traps that they used in those days gave satisfaction.

Q And these old traps made in 1915 and 1916 were efficient and successful traps, were they?

A I don't know anything about them in those days. I didn't sell them in those days.

Q Those are the dates you have given here in connection with these photographs.

A They seemed to be efficient. They are still working today. That is as much as I can tell about them.

Q In efficiency how did they compare with the latest traps made by the Trumble gas trap company?

A That all depends on what you mean by efficient. They are doing the work for those particular wells,

(Testimony of C. W. Cooper.)

and I don't know of any other trap that could do it better.

Q Then there is really no advantage, according to your view, in the new style Trumble traps over these old traps made in 1915 and 1916?

A There is an advantage in the latest improvements on any mechanical device.

Q Then the later Trumble traps do have an advantage over these earlier traps made in 1915 and 1916, do they?

MR. F. S. LYON: If your Honor please, we object on the ground that it is not re-recross examination and a subject-matter that was not even original cross-examination. The witness was not called in regard to anything except these old traps up in the San Joaquin Valley and the Taft field, and his examination has been limited to that.

MR. WESTALL: He has been asked on redirect examination what his experience was with gas traps, a broad question relating to his experience with gas traps, so it seems to me this is surely correct cross-examination.

THE COURT: Objection overruled.

A. What is the question?

MR. F. S. LYON: And the objection is further made upon the ground that it is vague and indefinite and uncertain. I don't know what counsel means by improvements, and I don't think the Court knows what the witness is answering about, and I don't know, un-

(Testimony of Milon J. Trumble.)
less it is shown what it is that he is interrogated about.

Q BY MR. WESTALL: I will ask this question, then: You have spoken of certain advantages of the later Trumble traps, saying that there was always an advantage in the new improvements. What improvements did you have in mind?

MR. F. S. LYON: We object to that as not cross examination. It is extending the examination of this witness into a matter that is not germane here.

THE COURT: I think that is true, that it is not strictly proper cross-examination. The general question referred more particularly to the collection of sand and sediment in the trap.

MR. WESTALL. An exception. That is all.

MR. F. S. LYON: That is all.

MILON J. TRUMBLE,

one of the Defendants, a witness called in behalf of the Defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. F. S. LYON:

Q Please state your name.

A Milon J. Trumble.

Q You are one of the defendants, Mr. Trumble?

A I am.

Q And you are the inventor of the Trumble gas trap?

(Testimony of Milon J. Trumble.)

A I am.

Q Are you the Milon J. Trumble mentioned in Plaintiffs' Exhibit 16, letters patent of the United States, 1,269,134?

A Yes, sir.

Q Will you please explain to the Court the construction and mode of operation of the gas trap therein illustrated and described? Don't waste time, Mr. Trumble, with unimportant details and give a general explanation of the functions to be performed and the manner of performance thereof.

A This is a cylindrical chamber. The oil and gas is admitted in the upper part of the receptacle and flows on the baffle plates or splasher plates, the oil running down in a thin film over the walls of the interior of the trap until it meets the level of the oil in the trap.

Q Just what is the object of spreading the oil out in that thin film?

A One of the objects is to allow the gas to separate readily from the oil.

Q And with regard to sand?

A Spreading the sand in a thin film so that it will flow down on the interior of the trap, settling on the outer portion of the wall or body of oil and settling into the bottom of the trap readily so that it can be drawn off.

Q Proceed.

A There is a float and valve mechanism to regulate the oil discharge from the trap. That practically con-

(Testimony of Milon J. Trumble.)
stitutes the operation of the trap. The oil valve regulates the outflow, and there is a pressure valve on top of the trap to maintain a pressure in the trap.

Q What, Mr. Trumble, has been your experience, I mean in length of time and generally, in and with gas traps? Hve you known of their actual operation and observed them, and so forth?

A I have.

Q To what extent?

A Well, since 1914. Before I adopted this trap I had observe the McLaughlin trap and the Stark trap in the Midway field, and I have had a great deal of experience in the oil business since 1902. I practically have been in touch with fields all of that time since 1902. While I have been in the refining business I have also been in touch with the oil fields and the production of oil and gas, the separation of oil and gas, the dephlegmation of gas and oil, and have had a great deal of experience along that line.

Q What, from your observation and knowledge of the construction and mode of operation of these gas traps, is the object of an oil seal in one of the traps?

A Only to prevent the gas from escaping through the oil discharge line.

Q And what other object than an oil seal is there in any of these traps for maintaining a column or quantity of oil in the trap?

A None particularly, if the valve operates and is positive. If the valve is positive and it shuts off, or if there is an oil seal of five or six inches above the

(Testimony of Milon J. Trumble.)

valve, that is all that is necessary. We have always recommended to set the oil level as high as it would operate successfully, that is the oil level could raise up to near the bottom of the first cone and would operate successfully. If there is anything happens to the valve, because of cutting out, which might happen to any valve, then it will help to seal it.

Q You have heard the testimony of some of the witnesses in this case in regard to the sand cutting the valves in the Trumble gas traps. Please state what has been your experience in that regard.

A We have had some valves cut out with sand. Any valve will cut out, because the sand blast is equal almost to emery, and under pressure it has a cutting tendency and it is impossible for any trap to separate the sand in a small receptacle like a gas trap that is being built by anybody in the game today without that happening. It will separate the sand so none of the sand will pass through the oil valve. A larger portion of the sand passes through the oil valve and through the oil line into the receiving tanks so there is always that danger of the sand cutting out the valve.

Q Are you the inventor and designer of the Trumble valve, Defendants' Exhibit GG?

A I am.

Q For what purpose did you invent and design that valve?

A For the Trumble gas trap, as a discharge valve on the trap.

(Testimony of Milon J. Trumble.)

Q And to take the place of what valve?

A We were using the Klipfel valve, and we also made the butterfly valve, but the butterfly valve wasn't entirely satisfactory. It would cut out sometimes. That was one of the reasons we placed the butterfly valve inside of the trap, which wasn't entirely satisfactory, although it worked. Where there wasn't any sand it gave no trouble, but if there was a great quantity of sand flowing it would cut out the valve. If the valve was inside of the trap it did avoid spraying the oil around the surrounding country. That is one of the reasons we put it inside. With the Klipfel valve it cut it out sometimes, although there are traps that have been in the field since 1915 where we haven't changed those valves.

Q When you installed this new style valve like Defendants' Exhibit GG in the Trumble trap, did you make other changes in the trap?

A We lengthened out the bottom portion of the sheet, putting the bumped head in the trap and possibly raised the cones a slight distance.

Q Why?

A Well, I was using a float that required a little more room to actuate it as it actuated thirty degrees each way from the center of the float axle housing.

Q Is that float that you have last referred to the float illustrated in Defendants' Exhibit M which I now show you?

A It is.

(Testimony of Milon J. Trumble.)

Q And were you the designer and inventor of that float?

A Yes, sir.

Q Did either the designing of this valve Defendants' Exhibit GG or the float Defendants' Exhibit M have for its or their purpose the maintenance of any particular level of oil in the trap or column of liquid in the trap?

A This valve after we put it on or applied it to the trap insured almost positively an oil seal, and thereby we could carry almost a constant level at any place we saw fit, which has always been the case if the valve worked and was positive.

Q But was the purpose of designing that valve or the purpose of designing the float that I have referred to for the purpose of increasing the oil level to be carried in the trap?

A No.

Q In other words, it had simply to do with the valve itself?

A Operating the valve, to cause it to operate, as it is a slide valve, and the pressure is on one side of the valve and causes considerable friction. Therefore we had to design a larger float to operate the valve.

Q You are familiar with the earlier Trumble traps that were manufactured and sold by the defendants, are you?

A Yes, sir.

(Testimony of Milon J. Trumble.)

Q Do you know at what levels of oil in the trap in the closed position of the valves or in the intermediate positions those earlier traps were operated?

A I always recommended that the level of the oil should be about even with the float axle in the housing, and I myself set the level above that several times to operate, and I always recommended it on account of there was always that danger of something happening to the valve, and I took that extra precaution in case the valve would cut out so that it would have the advantage of the head of oil.

Q How early did you so set such floats and valves?

A I believe the first traps we sent out were equipped that way.

Q You are familiar with Defendants' Exhibit YY, are you?

A Yes, sir.

Q This print, Mr. Trumble, which has the bent float axle?

A Yes, sir.

Q What was the purpose of providing a bent float axle?

A I myself bent the float axles, or rather the float arm, in the field while the trap was shut down. I have bent the arm so that they could easily regulate it to a higher level. We manufactured a few of those float arms which were bent, which would save that trouble in the field, and it was universal and could be turned either way.

(Testimony of Milon J. Trumble.)

Q In other words, the bend could be turned down or up as desired?

A Yes, sir; the float could be turned down and still the oil level in the trap could be at a higher level in the center of the manhole if you wanted to so operate it.

Q What was the purpose of the gage glasses?

A None whatever, only for this reason: to determine the danger line of the trap unsealed. It would be quite impossible to put on a trap a glass 36 inches long, as that would break so easily. Even with 18-inch glasses we had lots of trouble with them breaking. So we placed them so that the operator might avail himself of the level if it was coming to a danger line; if the valve, in other words, was cutting out, so that if the oil level was going down he could determine it.

Q In other words, to show the low level?

A Yes, sir.

Q But not necessarily the high level?

A No, sir; and we don't care about that high level.

Q Did you hear Mr. Lorraine's testimony in regard to an alleged advantage of maintaining what he termed a high oil level or a high column of oil in the trap, so far as accelerating or aiding the settling out of sand?

A I did.

Q Please state what you have to say in that regard, based upon your experience?

A If I remember right, he said that carrying a high oil level would give the oil an opportunity, or it

(Testimony of Milon J. Trumble.)

provided an opportunity for the gas to release itself from the oil, and also caused the sand to settle out quickly. That to my mind, and I have had lots of experience and am experimenting all the time as I have a laboratory and machine shop and am in a position to learn these things, as I have every equipment to determine—the sand will settle out from a large or a high column of oil slower, and it will take a greater length of time for it to settle to the bottom of the trap than it would in a lesser depth of oil. If there is a pressure exerted on that oil the sand will settle slower than it will if it is at atmospheric pressure. The oil is denser. The gas in the oil will always act according to the pressure exerted on the oil, and nobody can change it. That is absolutely true. In other words, if the trap is operating at 50 pounds pressure a certain amount of gas will be held in the oil, due to the pressure on the oil. If you carry it at 60 pounds there is a larger amount of gas held in the oil and it will stay there and would stay as long as that pressure is continued on that oil. If the pressure never was released the gas never would release; it would continue in the oil. On releasing to the atmosphere it immediately comes out of the oil and it looks in the tank like the oil is boiling as the gas is being released and coming out of the oil.

Q Then after hearing Mr. Lorraine's testimony, and basing the same upon your knowledge and experience in the refining and production of oil, and the operation of gas and oil separators, what have you to

(Testimony of Milon J. Trumble.)

say as to any apparent reason to you for maintaining any quantity of oil in a gas and oil separator other than to insure an oil seal?

A None whatsoever.

Q You have seen the Lorraine gas traps, have you?

A I have.

Q Do you know what feature it is that has been urged to the public as a sales point thereon?

MR. WESTALL: We object to that. There may have been a good many advantages. No doubt the advantage of the valves might have been urged, but that is of no pertinence to this case here. We are not suing upon the claims of the valves.

THE COURT: It is only a circumstance, and the weight of it is a matter for argument.

MR. F. S. LYON: I will admit, so far as this particular line of evidence is concerned, the only pertinency is to show that the so-called high level as an alleged invention was not recognized and was not the thing that sold the Lorraine gas traps. If counsel admits that there is no such contention in the case, then I will withdraw the question.

MR. WESTALL: The evidence doesn't prove—

THE COURT: It is a mere circumstance, and as to how much weight it shall have, or whether it shall have any weight, is a matter of argument; but I think it is competent as a circumstance in view of the assertion of Mr. Lorraine on this particular feature of advantage. Suppose it is possible for them to say that

(Testimony of Milon J. Trumble.)

he never has claimed any such thing in his dealings with his trade; that would be a circumstance; but how much weight we should give to it is a matter for you to argue. It is a relevant circumstance.

MR. WESTALL: Note an exception, please; and the further objection is made that the witness is not shown to be qualified to know.

THE COURT: Perhaps the foundation has not been laid as to whether he knows.

MR. F. S. LYON: That is the very question, your Honor, right now, what does he know. Read the question to the witness, please.

(Question read).

THE COURT: That calls for a yes or no answer, first, as to whether you know.

A. I do.

Q. BY MR. F. S. LYON: What feature?

A It seems the great talking point was on the synchronized valves. One of the earlier features was that this valve, or the trap operating with this valve on it, was capable of raising oil from the flow line or outflow line of the trap over into the top of the receiving tank, which would be eight or ten feet higher than the valve connection on the trap, with no pressure whatsoever in the trap. Several of the men in the field said that that was one of the features, that they could operate this trap without pressure in the trap and force the oil over into the top of the flow tanks.

(Testimony of Milon J. Trumble.)

Q You met that in connection with the actual competition with the Lorraine trap in the sale of the Trumble traps?

A Yes, sir. Mr. Townsend and I drove out to the field, and we got a pressure gage before going out, and we went to one of these traps that showed no pressure on the pressure gage and took this gage off and put our gage on it, and it showed 6 pounds pressure. That was sufficient to put the oil over into the flow tank. We went to another tank that showed no pressure and put on our gage, and it showed a pressure of eight pounds, which was suffiicent to run that oil into the flow tank. Then there was always the feature of the valves working in synchronism and closing the gas valve in time to prevent the oil from going over into the gas line, and that was a big sales feature or talking feature with the trap.

Q Mr. Trumble, if you disregard where your oil outlet is in a gas trap what difference does it make whether your normal level of oil is retained by the float while it is in the upper portion of the receptacle?

A Whether it is up in the upper portion?

Q Yes. Read the question, Mr. Reporter.

(Question read).

MR. WESTALL: I object to the question. Counsel hasn't defined what he means by normal level of the oil.

MR. F. S. LYON: That is exactly the purpose of the question. There are two things left out of the ques-

(Testimony of Milon J. Trumble.)

tion. The oil outlet is not placed anywhere, and it doesn't make any difference where you put it, and it doesn't make any difference where your level is as long as your float is in the upper portion.

A It would make no difference in the operation of the trap, as long as the oil level was below the gas take-off pipe.

Q In other words, the only operative relation is the oil seal?

A That is the principal idea of having a float to operate the valve, is to keep a sufficient seal in the trap.

Q And unless the oil outlet pipe is so high as to require the float to be up above the mid-vertical center of the trap, there is no reason for putting the float in operative position up in that portion of the trap, is there?

A. No reason whatsoever.

MR. F. S. LYON: You may take the witness, Mr. Westall.

CROSS EXAMINATION

BY MR. WESTALL:

Q Counsel has referred to a normal oil level. What do you understand by a normal oil level?

A I would say a sufficient oil level to prevent any unsealing of the trap.

Q Any sufficient amount to prevent it unsealing would be a normal oil level?

A That could be termed as a normal oil level, I would say, that would prevent the danger of unsealing.

(Testimony of Milon J. Trumble.)

Q Then an abnormal oil level would be something that would not seal, is that correct?

A The height it would go over in the gas line I might say would be abnormal.

Q You have to be careful to not get your oil level too high or it will go over into the gas line, won't it?

A There is that danger.

Q And if you get it too low the trap will not be sealed, that is, the valve would not be sealed?

A We generally try to regulate our traps so there is not any danger of unsealing the valve. That has always been recommended by me and by my salesmen, I think.

Q Referring to these two models, Defendants' Exhibit II and Defendants' Exhibit HH,—HH is the later model—you will notice that the oil outlet is much lower in your later model than it is in the old style trap, isn't it?

A I don't think it is.

MR. WESTALL: Well, I will let the court see.

A It might be in that particular trap. We only built I think three of those traps.

Q On that particular trap?

A Yes.

Q Well, if you only built three, how were the others made? This is not one of the usual, normal construction, is it?

A We changed this to a bumped bottom.

Q Did vou change the relative oil outlet?

A We might have changed the outlet, but that wouldn't govern the level in the trap of the oil.

(Testimony of Milon J. Trumble.)

Q As a matter of fact, in this late model if you had the oil level—

A In this late model the float is thirty degrees below the center of the manhole, and its extreme opening is thirty degrees above, so at thirty degrees below we have set that as a closed position.

Q The normal oil level in your late model here as shown by this exhibit Defendants' Exhibit HH would be about where?

A That would depend on the quantity of oil passing through the trap. If it was a very light well the valve would only be cracked a very slight amount, or there would be a very slight orifice, so the float would stand nearly thirty degrees below center. If it happened to be a heavy head that would belch a great amount of oil, it might raise that float to the center line for a few minutes and then it would gradually settle back until the valve would close.

Q How far does that float on Defendants' Exhibit HH submerge in the oil?

A It might submerge one-third.

Q How far would the float on the other exhibit, Defendants' Exhibit II, submerge?

A I would say it would submerge three-fourths of the diameter, and it might submerge farther than that on starting the valve to open.

Q Isn't it obvious from an inspection of these two models that you have a much greater depth of oil in your later model than you had in your prior model?

A You haven't as great a depth. That oil outlet doesn't mean anything. That would be placed on the

(Testimony of Milon J. Trumble.)
extreme bottom or up in the trap. It doesn't make any difference, the column of oil in the trap.

Q The column of oil would maintain the seal, wouldn't it?

A Yes; but that could be placed up higher or be placed on the extreme bottom. We have operated some with the valve close to the bottom.

Q You wouldn't need an oil level any further than say about that to maintain an effective seal, if that was all that you desired to do, would you?

A You might call that an effective seal.

Q So that if all you wanted was an effective seal of that oil outlet you could have your oil level much below the vertical center of your receptacle, couldn't you, in this late model, Defendants' Exhibit HH?

A Why should we carry it below there when there is nothing to prevent us from carrying it at a higher level, which will ensure a more permanent seal in case something should happen to the outlet valve?

Q Well, I don't know of any particular reason except—

A We have always carried an oil level up to the float axle, and I have always recommended to carry that level at that point and then anybody passing the trap could see the arm here extended in a horizontal position, which would determine, practically, the level of the oil in the trap, after one has acquainted himself with the trap.

(Thereupon a recess was had until Thursday, April 30, 1924, at ten o'clock a. m.).

(Testimony of Milon J. Trumble.)

LOS ANGELES, CALIFORNIA, WEDNESDAY, APRIL 30, 1924. 10 A.M.

(Appearances as heretofore noted).

MILON J. TRUMBLE recalled.

CROSS EXAMINATION resumed

BY MR. WESTALL:

Q Mr. Trumble, when a well flows by gushes or by heads is there or is there not a greater variation in the oil level in the separator attached to such well?

A That would depend on the amount of oil only, not the amount of gas; the amount of oil coming into the separator.

Q Under what conditions where the well flows by gushes and heads would there be a greater variation in the oil level?

A If there was a large amount of oil coming in the float would have to raise high enough to actuate the valve or open the valve to let the oil out.

Q I am not asking about how high the float should be, but I am asking you whether or not there would be a greater variation in the level.

A There would be some variation.

Q Would there be a greater variation under those conditions than there would if the well did not flow in that manner?

A Yes; there would.

Q BY THE COURT: You are assuming, of course, Mr. Trumble, that between heads there is no flow?

(Testimony of Milon J. Trumble.)

A No; that is it. The oil level will seek a certain level, according to the valves closing.

Q BY MR. WESTALL: Your device of patent 1,269,134 of June 11, 1918, was designed particularly to be used on wells in which the pressure of gas and oil varied, that is, where the oil flowed by gushes or by heads; isn't that correct?

A All gas traps are built to take care of any fluctuation whatsoever. It wouldn't be an efficient trap if it wouldn't do that.

Q Your patent was particularly designed for that purpose, was it not?

A It was designed to take care of any fluctuation that might happen in the flowing of oil into the trap, or gas, either one.

Q Will you answer the question? Was your patent designed particularly for that purpose, or your device?

A For what purpose? I don't just understand you.

Q I call your attention to line 24, page 1, of the specification: "My invention is also adapted to reduce the velocity and equalize the delivery of oil from wells in which the pressure of gas causes the oil to flow in gushes or by heads."

A It would reduce the velocity; yes.

Q That was one of the purposes and objects of your invention as disclosed in this patent, was it not?

A It was in order to separate the oil from gas, or gas from oil.

Q Will you answer that question?

(Testimony of Milon J. Trumble.)

MR. F. S. LYON: If your Honor please, I submit the question has been answered by the witness and it is a mere repetition.

THE COURT: Read the question, please.

Q BY MR. WESTALL: Will you answer that question, please?

A What is the question?

(Previous question read).

A That was probably one of the objects, to slow up the oil, or have a chamber large enough to slow the oil.

Q It isn't probably, but it is an actual fact that that is one of the purposes and objects of this device as described in this patent, is it not, in the part that I have just read to you?

A I don't just understand your meaning, what you mean, or what you are trying to get at. If you will explain it so that I can get it, I will answer it.

Q I will repeat the question: Isn't it a fact that your invention was designed to reduce the velocity and equalize the delivery of oil from wells in which the pressure of gas causes the oil to flow in gushes or by heads?

A It does do that.

Q That was the design of it?

A That was one of the features, I will say.

Q What kind of a valve is shown in your patent 1,269,134 of June 11, 1918?

A I haven't a copy of it.

(Testimony of Milon J. Trumble.)

MR. F. S. LYON: The question is objected to as not the best evidence. The patent itself shows.

A We never built one of those valves or never operated one. That was only to indicate a means whereby the oil could be controlled by a float.

Q BY MR. WESTALL: I am not asking you whether you built one; I am asking you what kind of a valve that is.

A It is a valve that would close or open on the raising or lowering of the oil.

THE COURT: Is it any particular kind of valve that is shown?

Q BY MR. WESTALL: What would you call that valve?

A Well, I don't know as I have ever called it anything. It was a means to open or close. It was a triple valve in a way. The valve was made so—or there were two valves in it. There is a certain pinion in the center of that valve that pulls out to help unseal.

Q As I understand you, you never constructed a trap with the kind of valve shown at 40 and 41 in your patent 1,269,134 of June 11, 1918.

A We never built that valve and put it in any trap.

Q Why didn't you?

A I didn't think it was an effiicent valve.

Q Then why did you show it in your patent?

A We showed a means—

MR. F. S. LYON: We object to that as immaterial.

(Testimony of Milon J. Trumble.)

MR. WESTALL: I think not. Counsel has asked many questions about the action of the oil.

THE COURT: Is there any claim on that particular valve?

MR. F. S. LYON: There is no claim in the patent on any particular valve construction, and it is simply what is known as a diagrammatic illustration. We must show a valve means, but there is no particular claim on that particular construction of valve.

MR. WESTALL: If the Court please, this patent shows what the inventor had in mind from the time he applied, November 14, until it was granted, June 11, 1918. Counsel has had the witness explain this patent and refer to the action of the oil in other parts, and one of the most important parts is the action of that valve and the action of the float connected with the valve, and the oil level as shown in this, and this is a question that relates to that.

MR. F. S. LYON: The patent, so far as the patent instrument goes, for instance, in Claim 3, is means for withdrawing the oil from the chamber; Claim 6 is a float-controlled valve outlet. There is no claim in the patent upon any particular valve.

THE COURT: Unless you claim that this is the only kind of valve that would work on a float, it seems to me that any valve that would work by means of a float might be included. If that is true, what is the use of wasting time on this, unless he has tied himself to a particular valve as being the only kind of valve that would work with the float?

(Testimony of Milon J. Trumble.)

MR. WESTALL: In the first place, in answer to counsel's suggestion that the claims of this patent have something to do with it, they haven't. The question is, What kind of a device did he illustrate and did he explain to the world as constituting his invention? He claimed certain parts of that. We are not interested in what he claimed, but what is disclosed. It is true that there might be other forms of valves used in the place of this one, but this one operated in a certain wat with a certain range of movement, and it must have illustrated, or been one form at least illustrating what he had in mind at the time he attempted to convey his idea of what a trap should be. The operation of this valve and its range of movement is quite important.

A This valve was never manufactured or put in the trap, and I remember very clearly Mr. Townsend, who was my patent attorney, said it was unnecessary to define the valve more than to show that there was a means that would do the thing we wanted to do and we could use any means of a valve, and that is what I understood.

MR. F. S. LYON: Let's see if counsel and the witness are referring to the same valve. What valve did you refer to in your last answer?

A. 42; the outlet valve of 41 and 42.

Q BY MR. WESTALL: As a matter of fact, you didn't know whether the valve shown in your patent would be successful or not, did you?

(Testimony of Milon J. Trumble.)

A I didn't think we would ever use that type of valve.

Q Did you consider that there would be an efficient seal of the trap if you used the kind of valve referred to?

A It could, yes.

Q And yet you show the valve in closed position with an oil level just slightly above the part where the conical portion connects to the cylindrical portion of the trap, do you not?

A It might in this particular instance; but that float lever could be up in the center of the trap if you wanted it there.

Q The float lever could not be up in the center of the trap without opening the valve, could it?

A It could if the float lever was extended to that—

Q If you bent the float lever?

A Yes, or lengthened it out.

Q Or changed it from that shown in the patent?

A It could be raised up to the center or above if you wanted to.

Q Now if you made the valve such as disclosed in your patent 1,269,134 a full opening would require a very slight upward movement of the float, would it not?

A It would require quite an opening, because that valve is almost identical with the valve above. It is two valves in one. There is a central valve, which is a small valve, that would break the seal, and that would

(Testimony of Milon J. Trumble.)

have to pull out first; then it would travel on up to about that projection and that center pivot would pull the other valve.

Q That would only be a slight upward movement, would it not?

A It could be quite a movement.

Q How much of a movement of the float on the scale of your said patent drawing would cause the valve of that patent 1,269,134 to open fully?

MR. F. S. LYON: We object to the question on the ground that it is totally misleading. Patent Office drawings are not drawn to scale; they are purely illustrative, and are not intended to be in proportion or in scale; and the whole matter is immaterial in this case.

THE COURT: If he can answer it according to the general design; if he can approximate it that way, for approximate purposes, he may do so.

A I never operated one of these valves. I could design that valve so that it would have as much movement as we want on any valve. It is easy to design it. It is a cinch, and from my experience in mechanics I would design the valve so that it would operate according to my wishes.

Q BY MR. WESTALL: The oil level in your trap of your said patent is shown when the valve is in fully closed position, is it not, as illustrated in Fig. 2?

A I don't know whether that shows it fully closed or not. It looks as though there is a periphery around the valve there now.

(Testimony of Milon J. Trumble.)

Q It looks as though what?

A That there is an opening. But I don't know as there is.

Q Then if it is fully closed the level would be still lower, would it not?

A It might be. We didn't determine that as any level to be determined in the trap; that was to show that there was a seal, and it shows that.

Q Now is it not a fact that under normal conditions, with a normal level, the outlet valve of the gas trap which is operating successfully will be partly open? That is to say, it will not be either fully closed or fully open, will it?

A If there is oil passing through the valve it would not be fully closed, no.

Q Well, at one of these levels you have spoken of the valve will be partly open, will it not, to allow a constant egress of the oil from the trap?

A It will depend on the amount of oil being admitted to the trap as to the opening of the valve.

Q Well, at the normal level that you have spoken of it won't be completely closed, will it?

A If you would say the positive level after the well quits flowing and the valve is closed,—I don't just understand what you mean there. The valve could be open and a certain amount of oil coming in the trap which would be passed out. Now if the well should cease flowing the valve could close and then no oil would escape from the trap. Now whether that would

(Testimony of Milon J. Trumble.)

be the normal level or the level at intervals in the different levels of the oil as the—

Q Now some of the witnesses have stated that the oil level in certain traps was near the top of the gage glass and that it was very constant in some of the wells. At that level indicated by those witnesses the valve would be partly open, would it not; it wouldn't be fully closed or fully opened?

A It could be fully closed and the oil could be above the top of the gage glass. It could be set that way, and I have myself set the oil level above the top of the gage glass, and have operated them for a great length of time, and have carried on extensive experiments with the trap under those conditions. That is true. There is no question about that. And I always recommended to my men in handling those traps, the salesmen and the operators in the field, to set the oil level in those traps at a higher level to insure a perfect seal because our valve at that time was not absolutely efficient; it would cut out sometimes; and a sleeve valve, even if it does not cut out, will leak a little bit, and if a well lays off for any great length of time the oil will go down and break the seal and allow the gas to go out in the gas line.

Q What do you mean by setting the oil level at a certain height?

A Up to the float axle housing, or the center of it, or somewhere near that, so that the arm will project in practically a horizontal position.

(Testimony of Milon J. Trumble.)

Q Now where the oil level is set at that position is the valve open or closed?

A If it is set in that position the valve would be closed. If we set the valve to open, as soon as the oil level reached the center of the trap the valve would be just started to open at that level.

Q So that when you say you set your oil level about the center of the manhole, or near the top or at the top of the gage glass, you mean that that is the level at which the valve would just start to open if the level went down lower?

A In setting the level on those traps we generally turn the oil into the trap and as the float comes up to where the outside line would register a horizontal position we slip the pin through the corresponding hole from the lever, reaching up to the valve from the float lever to the axle. That would then determine the level in the trap.

Q Yes. Well, at that level, then, the valve is fully closed; is that right?

A It could be fully closed there at that level.

Q And when you speak of the normal level, then, setting the trap at a certain level, you mean you are setting it at a level at which the valve is closed, or which, if the oil moves the least bit downward in the trap, the valve will commence to open. Is that correct?

MR. F. S. LYON: I don't think the witness has used the term "normal" at all.

(Testimony of Milon J. Trumble.)

THE COURT: No, it is just the other way. The oil drops farther down and the valve becomes more closed.

MR. WESTALL: Yes.

A The float would follow down on the level of the oil, I would say, to a certain distance, until it came to a stop.

THE COURT: That is, if you took your tank separately and filled it up with oil to the top the valve would open and the oil would flow out the outlet so long as there was an outlet?

A That is true.

Q And if no more oil came in your float would sink until it closed the valve and there the level would remain stationary?

A If the valve was positive, yes.

Q BY MR. WESTALL: Now the normal oil level would be somewhere between the upper range of movement of your float and the position shown in Fig. 2 of the drawings of your patent, would it not?

MR. F. S. LYON: We object to that question and the use of the word "normal".

Q BY THE COURT: Well, if you had a constant flow of a fixed volume, and gas pressure alike, then your oil level would maintain a comparatively fixed position, because in order to allow the oil to go out as fast as it came in the valve would have to move to a certain extent?

A It would have to open to compensate for that.

(Testimony of Milon J. Trumble.)

Q And under those conditions you could figure a normal level, could you not, but under changing conditions you could not, because it would range from completely open to completely closed?

A That is true. And all wells act that way, or most of them. Very few wells flow a steady flow.

Q You can't figure on fixed conditions and on their continuing.

A No.

Q BY MR. WESTALL: Is this oil level illustrated in your patent 1,269,134 too low an oil level for practical operation?

A For what purpose did you say?

THE COURT: For sealing the outlet.

A That would seal the outlet absolutely.

Q BY MR. WESTALL: You would have an efficient seal at that level?

A That will seal the outlet, and if the oil never goes below that position in the trap it never will break the seal.

Q There has been some suggestion in the testimony heretofore given that possibly the stand-pipe 3 shown in Fig. 1 of the drawings of your patent 1,269,134 is part of the settling chamber of the trap. It is a fact, is it not, that the settling chamber in your patent is described as the conical bottom of the separator and the pipe 2 is described not as part of the separator but as a support for the trap?

MR. F. S. LYON: We object to that question on the ground that so far as the form of the question is

(Testimony of Milon J. Trumble.)

concerned the description of the patent is the best evidence, and that the question does not call for the operative fact, and is immaterial and merely argumentative.

MR. WESTALL: I call the witness's attention to line 56, page 1, of the specification. Now it seems to me if the patent is correct the question of whether it is right or wrong—it has been questioned in the testimony on behalf of the plaintiff.

MR. F. S. LYON: This patent is not in suit in this case, and the patent was drawn for the purpose of disclosing and describing an invention, and that invention was a manner of separating the gas from the oil and retaining the lighter constituents of the gas in the oil. The details that counsel refers to are in no way material to the invention as described in the claims. It is merely an argumentative matter entirely.

MR. WESTALL: It is material to some of the contentions of the defendant upon this trial as to what different parts were.

(Last question read).

THE COURT: You may construe your own description of it.

A That is a settling chamber. It communicates with the trap by a solid column of oil. Whatever diameter the pipe is, it extends from the trap downward.

Q BY MR. WESTALL: Well, you made and signed and approved this statement in which it is described as a supporting column for the trap, didn't you?

A It supports the trap too.

(Testimony of Milon J. Trumble.)

Q Now is it not a fact that oil as it ordinarily comes from a well into a gas separator comes in with considerable force and is in a mixed or turbulent condition?

A That depends entirely on the pressure and flow of the quantity of oil and gas.

Q Well, in a large number of wells it is true, is it not?

A It is.

Q And the oil comes in with a large amount of froth and foam, does it not, sometimes?

A Not necessarily. There is a spraying effect. Gas is not a solvent.

Q Can you tell what the pressure of the oil is as it comes from the well?

A If you have a pressure-regulating means, such as a pressure gage, that would indicate it, I would say, yes.

Q Well, I am asking you what is the pressure. Can you tell what amount of pressure there is that the oil coming from a well exerts in a trap?

A It varys, say, from 150 to—it might go up to 1500 pounds.

Q Could you give any approximation or average?

A I have seen it all the way from 150 up to 1000 pounds pressure, and down as low as 5 pounds.

Q Well, when it comes into the trap, then, under any such pressure, it comes in with considerable force, does it not?

(Testimony of Milon J. Trumble.)

A That depends on the pressure, of course, maintained in the trap.

Q Well, assuming that there is a pressure in the trap.

A Well, the corresponding pressure there would be the difference between the pressure in the trap and the pressure of the oil released from the flow nipple at the well.

Q I am asking you, if the oil comes from the well under a considerable force or pressure it would be in a turbulent condition when it reached the trap, would it not?

A In a spray.

Q Sprayed in the trap; rather violently?

A It could be violent in some instances.

Q Under average conditions it would be violently sprayed in the trap?

MR. F. S. LYON: We object to the term "average" again.

THE COURT: Well, if you can average it, say so; if not, say so.

A It would be hard to average, because nearly every well flows differently. They flow different quantities of oil and different quantities of gas. Some wells flow a large quantity of oil and gas with a large quantity of water or emulsion. So that it would be hard to average it.

Q BY MR. WESTALL: Now, when the oil has sand in it of course that sand is churned and mixed up in the oil, is it not?

(Testimony of Milon J. Trumble.)

A It comes in with the oil, and I don't think it is churned after it goes into the trap.

Q Well, you don't churn it after it gets into the trap, do you?

A It is not necessary. It is better to keep it in as quiescent a condition as possible.

Q You want to keep it quiet in the trap?

A As nearly as possible.

Q In order to allow the sand to settle out?

A To settle out quicker, yes.

Q Now it is a fact that the sand will settle out in the separator better if given a little time than if rushed right through the separator, is it not?

A Well, I think the oil is rushing through the separator, isn't it? Do you hold the oil in a plane in the separator and allow none of it to escape? There is a current in the separator, is there not?

Q Well, what I mean is this: If you convey your oil to a tank or separator and allow it to remain some little time, a few minutes for instance, we will say, in the tank, the sand will settle out better than if you just momentarily rush it through the separator and then carry it on?

A That would depend on how the oil and sand are admitted into the separator. If the oil and sand are admitted into the separator and sprayed on the interior of the separator in a thin film, when the oil meets the level of the oil in the separator the sand adheres to the plate and follows down the outer side of the oil

(Testimony of Milon J. Trumble.)
film into the lower edge of the trap and is not entrained in the flow of oil as much as it would be if it was flowing from one side of the trap, say one-third of the diameter of the trap, over to a take-off pipe. There would be a current, in other words, set up towards the point of exit.

Q Now when this oil gets in the bottom of the trap it remains in the bottom for some short time, does it not, to allow a certain amount of settling?

A I would say the oil below the outlet pipe stays in the bottom of the trap perhaps until somebody draws it off. But above that level there is a current set up, an agitation, by the oil seeking an outlet.

Q Suppose you take a barrel of oil and put it in a receptacle and allow it to stand for say ten minutes, there would be a more complete settling of the sand out of the oil in that length of time than there would be if you only allowed it to stand in the receptacle one minute?

A That would depend entirely on the viscosity of the oil.

Q BY MR. WESTALL: Assuming that in both the viscosity of the oil is the same.

A If it was a heavy viscous oil there would practically be no settlement in ten minutes time or twenty minutes time.

Q Suppose you allowed it to stand in there an hour, there would be settling, wouldn't there?

A There might be a slight stratification.

(Testimony of Milon J. Trumble.)

Q In other words, it takes a considerable time for the oil to stand in a receptacle before the sand will settle out, doesn't it?

A It would have to be held in a quiescent condition, which is not done in the gas trap only below the take-off pipe. That is the only quiescent part of the trap.

Q If you have a volume of oil in your trap of say ten barrels of oil in the bottom of the trap—

A Did you ever see one that contained that much oil?

Q I am just taking a theoretical case. I am just making up a case now. Supposing there were ten barrels in the bottom of that trap, you would in a trap of that kind get a more complete separation than you would in a trap which had only a capacity of one barrel, wouldn't you?

MR. F. S. LYON: We object to that question as irrelevant, immaterial, hypothetical, and not applying to the conditions of the case in any manner whatsoever, and there being no showing that in any of these traps there was any such condition ever obtained. It is argumentative on an immaterial matter.

MR. WESTALL: The witness has testified as an expert, and it is simply asking him in order to show that the volume of that oil in the bottom of the trap is a great factor in securing a settlement of the sand.

THE COURT: He may answer it as an up-and-down proposition. I should judge, however, that you

(Testimony of Milon J. Trumble.)
would have t o expand your cylinder; in other words, you would have to enlarge the diameter to secure that effect.

A Not necessarily.

Q Well, the up and down cylinder operates your float, and if you have an expansive diameter then your float would not move so fast; in other words, it doesn't move the valve so quickly; it opens it slower, and it takes more oil to open it to the same point. I can't see how the up-and-down height would have any effect there in keeping the oil longer in the cylinder.

BY MR. WESTALL: If you have a larger amount of oil in the bottom of your separator, naturally, other things being equal—suppose you would have ten barrels in the bottom, and suppose that the oil was going out at the rate of one barrel a minute, now every one of those barrels has ten minutes, or ten times as long as if you had a capacity of only one barrel.

THE COURT: No, I can't see that at all.

MR. WESTALL: That will be shown to your Honor, I think; that will be demonstrated.

THE COURT: I can't see the mathematics on that. The passage out is regulated by your float and the opening of your outlet pipe, and whether you have two feet of oil or three feet of oil your oil is going out just as fast, assuming your stated diameter of your cylinder; it is going out just as fast whether it is two feet deep or three feet deep.

Q BY MR. WESTALL: It is a fact, is it not, that if the oil comes into the trap by gushes or heads

(Testimony of Milòn J. Trumble.)

from the well, in your patent 1,269,134, that that would not affect to any great degree the variation of the oil level?

A I never operated one of these traps built in accordance with this; I mean the float on that particular valve.

Q I am not talking about the float; I am talking about the trap as a whole. This trap that you invented was designed to take care of conditions where the oil came in gushes or by heads, was it not, and your trap was designed to do away with any effect of extreme variations caused by those gushes or heads?

A I did design a trap to overcome that as nearly as I possibly could.

Q Did it have that effect?

A The level will fluctuate the depth in the trap according to the amount of oil coming in, that is, to a certain degree.

Q BY THE COURT: That would have the effect of any float contrivance, wouldn't it?

A Yes.

Q BY MR. WESTALL: Your velocity reducer would take care of those various variations in flow, would it not, that is, that is what it was on the trap for?

A I think the oil would be admitted to the trap at the same rate of speed, practically, through that pipe as it would through the pipe that we use now. The gas and oil might separate in that pipe, because gas separates very readily from oil.

(Testimony of Milon J. Trumble.)

Q BY THE COURT: If the float arrangement didn't take care of that then you might just as well have a fixed pipe leading out from the side of your cylinder to let the oil out?

A Yes. If the float was inactive we might as well have a stand-pipe. We used to have a stand-pipe or a U-pipe up by the side, allowing the oil to flow over to trap off and accumulate some oil for the boilers.

Q BY MR. WESTALL: Yet the design of this velocity reducer was to take care of those fluctuations, was it not?

A It wasn't necessary. I think we did put those on a trap or two, but we saw it wasn't necessary. I think there was a 6-inch pipe on a few of the traps where the oil came into the trap.

Q What is the purpose of the second cone in the top of the separator, shown in your patent 1,269,134?

A What is the purpose of that cone?

Q Yes.

A I might say that it is not necessary to be in there. We might eliminate it and it would work just as efficiently.

Q When did you first discover that you might eliminate that extra cone?

A Well, I have carried on extensive experimenting along that line since 1915.

Q Up until 1918 at least you didn't convince yourself that that second baffle was of no benefit or advantage, did you?

(Testimony of Milon J. Trumble.)

A We continued to put the cones in there, but I will say that the trap will operate probably as efficiently with one cone as it will with two or three or five.

Q What idea did you have as to the purpose of those additional cones that you put in during all of those years?

A It might have been the first thought that if the oil rolled off from the side of the trap through any unforseseen reason that it might fall on the cone and be directed back against the wall of the trap again.

Q Did you ever conduct any experiments to find out whether that was the fact that it would operate that way?

A I have conducted experiments along that line.

Q When did you conduct those experiments?

A I will say in 1917.

Q In some of your traps you had as many as four cones, didn't you?

A I think perhaps there was one or two of them that had four cones in.

Q And you made some of those as late as 1918, didn't you?

A I don't remember for sure. We might have. I wouldn't say. I might put in five cones now, if I wanted to, and it wouldn't make any difference, particularly.

Q They wouldn't be of any use, would they?

A I would say two or three cones; not more than that.

(Testimony of Milon J. Trumble.)

Q What function would the second and third cones perform?

A If the oil would fall over it would direct it back against the side of the wall.

Q Yet you say you could operate just as well and just as successfully with one cone as three or four?

A I think perhaps it would. I don't see any reason why it wouldn't.

Q You also had some kind of a pan or arrangement below the lowest cone in some of your 4-cone constructions made in 1917 or 1918, didn't you?

A I think we built one of those traps. I don't know whether we built two or not. I know we built one and tried it out.

Q What was the purpose of that pan?

A Closing the outlet gas line in case the oil would reach a level where there would be danger of its going into the gas line.

Q How would it close the gas line?

A If the oil should come up and meet that pan, which was a pan inverted, it would close the valve in the gas line. That would put an extra pressure onto the trap which would tend to force the oil out the oil exit and then the oil would recede in the trap.

Q Then that pan was similar to the gas outlet valve in your patent 1,269,134?

A What is that question?

Q That pan we have been referring to.

(Testimony of Milon J. Trumble.)

A It was an inverted pan. There was no bottom in the pan. That acted as a float and as a weight. When the oil receded, then it was acting as a weight. It would have a great pulling effect.

Q Then it acted as a valve to shut off the gas?

A Yes.

Q BY MR. F. S. LYON: Are you referring, Mr. Trumble, to this pan 33 of the patent?

A Pan 33.

MR. F. S. LYON: I think Mr. Westall is referring to a plate that you put in some of these traps for the Union Oil Company.

A You are referring to the patent, aren't you?

MR. WESTALL: I am referring to what Mr. Lyon has mentioned particularly.

A If you were referring to the patent when you were talking to me, that is what I was talking on.

Q Regarding this pan or plate that you put into the trap sold to the Union Oil Company, which was down below the fourth cone some place, what was the purpose of that pan?

A That was an experimental proposition.

Q What was the purpose of it?

A Accumulating a lighter product than the oil in the bottom of the trap; in other words, a saturating proposition. There were patentable features in that, of course.

Q I wish you would explain a little more fully what you mean by that last answer. What function

(Testimony of Milon J. Trumble.)
would that pan or obstruction or plate that was below the last cone perform?

Q BY MR. F. S. LYON: You say that there were patentable features in that. Was that one of the Union Oil Company's features, or is that one of yours?

A One of mine.

MR. F. S. LYON: All right.

A It was a tank. It was enclosed as a tank, or you might say an extra gas trap within another trap with a multiplicity of surfaces for the purpose of separating or saturating and taking out the heavier constituent in the gas, and on some of them we had an extra draw-off where we could draw that off outside of the trap.

Q BY MR. WESTALL: Was this thing a plate or a cone, or just what was the construction?

A It was in a tank form.

Q How was it fastened on the lowest cone?

A It was welded onto the center gas pipe.

Q Was it a closed tank?

A No; there were openings so the gas could go into it.

Q Where was it open?

A Near the top.

Q Was it of a cylindrical shape?

A It was a round tank that fitted inside, leaving a surface between the tank and the wall of the trap.

Q It wasn't open at the bottom of the tank?

A No, it was not, only by a small pipe flange that was put on there.

(Testimony of Milon J. Trumble.)

Q How did that operate and what did it do?

A It didn't work out entirely satisfactorily, and of course we only built I think just two or three of those traps. It didn't accumulate enough to warrant us to go on with the construction.

Q What was it supposed to accumulate?

A It might, as I say, accumulate some of the heavier particles from the gas, which it did.

Q Then when it accumulated those heavier particles what was it supposed to do then?

A We could draw them off, or could let them go down into the bottom of the trap into the oil.

Q By what means would you draw them out, and by what means would you permit them to go to the bottom of the oil?

A It could be by a pipe opening at the lower end, which projected down into the oil below the surface of the oil, or we could draw it off out of the side of the trap if we connected it up, which I did on one of them just for a test.

Q What was the particular construction of the trap at the Union Oil Company, on Chapman No. 1 and Chapman No. 2, on which this device was used that you have referred to?

A It was a tank, as I say; one tank inside of another?

Q What kind of pipes did it have connected to it?

A I don't remember whether there were any on those traps out there. Do you mean for bleeder out of that tank?

(Testimony of Milon J. Trumble.)

Q Yes.

A I don't think there was any on that. I think just one put on so we could see the operation.

Q So it was just sort of a tank or can or something welded or fastened onto the lower baffle plate and extending down below the lower baffle plate?

A I think it came even, or a trifle below. If I had the print I could tell that, but I am not just sure now. I think it came even with the lower periphery of the baffle plate.

MR. WESTALL: Will you produce that drawing?

MR. GRAHAM: It is Defendants' Exhibit P.

Q BY MR. F. S. LYON: Is that the print you want, Mr. Trumble?

A Yes, this is the one.

Q BY MR. WESTALL: Referring to Defendants' Exhibit P, I wish you would please describe the purpose of the pan, the device that we have been discussing.

A It was for what I said, that I figured we would accumulate some of the heavier particles from the gas in this pan. There were, as I say, some patentable features that I figured at that time, that we didn't show in the drawings, but I did build one trap and put in some of the other features. In other words, this is two traps in one. This cone is inside of this trap. That was open up there so that the gas could go in at that point and pass down here and go up to this point. The gas could pass in at the top of this tank and around the cone in the tank and up under

(Testimony of Milon J. Trumble.)
that into perforations in the gas line. It could also pass under the lower cone in the tank and into the lower end of the gas line projected into the tank.

Q BY MR. GRAHAM: And the gas passing over these surfaces?

A Yes. And I also had other things in there. There was a scrubber effect also.

Q BY MR. WESTALL: The purpose of that device was to secure a more complete separation, wasn't it, of the oil and gas?

A I was working on saturating propositions at that time, and that is how I came to put that in there.

Q Isn't it a fact if a gage glass were put on a trap made in accordance with the drawings of your patent 1,269,134, dated June 11, 1918, at the place where you put such gage glasses from the time you first commenced to manufacture gas traps in 1914 up to 1920 or 1921, and the bottom of the gage glass was slightly above the point where the conical bottom of the trap is connected to the cylindrical portion, that such gage glass would show the oil level when the valve was closed and when it was open and at all intermediate points between full open and full closed?

MR. F. S. LYON: We object to that question as involved and impossible of understanding. Counsel first refers to the trap of the patent. I don't know what the question means, myself, or what its import is, and I think it is an absolutely unfair question tied in the manner in which it is tied, and I ask that it be

re-read to the Court so that the Court may consider it.

THE COURT: Just read the question.

(Question read).

Q BY THE COURT: Do you understand it?

A Yes.

Q All right, you may answer it.

A That would depend where we set the oil level in the trap. If the oil level was set above the gage glass the gage glass wouldn't indicate anything only that the gage glass was full of oil. Many traps we operate in that condition. If the oil was below the top of the gage glass, then it would show the travel of the oil as it fluctuated inside of the trap, to a certain degree.

Q BY MR. WESTALL: The answer isn't responsive to the question. I have referred to the drawings of your patent, which show an oil level, and you are to assume that the level was set as shown in that trap and the level at closed position as shown in the trap of the patent.

MR. F. S. LYON: We renew our objection on the ground it is merely argumentative and hypothetical, and no such condition has ever existed.

MR. WESTALL: I will say that it has existed and does exist all the time.

THE COURT: I think you had better reframe the question, because your question did not include any reference to the drawing except as describing the patent. Then you asked him as to their practice and

(Testimony of Milon J. Trumble.)
manufacture during certain years, as to the lower location of the oil gage.

MR. WESTALL: Will you read the first part of the question?

(Record read).

MR. WESTALL: I said a trap made in accordance with the drawings of his patent. The question is if he put a gage glass on the drawings Fig. 2 of his patent, on a trap made in accordance with that drawing, at the place that those gage glasses were put on his early traps, namely, near the bottom of the cylindrical portion of the trap, if that gage glass would show all fluctuations of level between extreme open and an extreme closed position. I am referring only to this particular construction in the patent.

MR. F. S. LYON: We object to that as argumentative. If counsel wishes, for his own purposes, to assume that the drawings of this patent are to scale, then in fairness to the witness he should identify what he means by the position and not put it up to the witness to try and approximate what counsel has in mind.

MR. WESTALL: I think the question is clear enough.

THE COURT: He will have to assume that the illustration here is made a part of the question, not necessarily the description of the patent or the claims of the patent, but the illustration of the oil level particularly.

(Testimony of Milon J. Trumble.)

MR. WESTALL: Yes, that is the question.

MR. F. S. LYON: In that connection, your Honor, I wish to point out this: that the question is not fair unless counsel excludes some other things, because in this patent there is shown a valve 33 which is to be operated by the rise of the oil to close the gas outlet and so described in the patent. The import and tenor of the question, which is purely argumentative in regard to something else, is totally immaterial unless the proportions of this particular drawing of the patent are read into the question, and unless the mode of operation of the patent so far as valve 33 is concerned is excluded.

MR. WESTALL: I don't think that is so. I think the question, your Honor, is very clear, and that the witness can answer it. I think the answer is obvious.

THE COURT: As I understand the question, it is, Assuming that the oil level is in relatively the position which the illustration shows it to be with respect to other parts of the cylinder, particularly to the joining of the cone part, and that you attached an oil gage as you customarily attached it during the period which counsel has mentioned, so that when attached it would register the level, taking all of those things as assumptions, would your gage register the complete range of the flow?

A We never did build a trap—

MR. WESTALL: That doesn't answer the question.

(Testimony of Milon J. Trumble.)

A You are just going to assume now that the trap is built in accordance with this?

THE COURT: That this illustrates it.

A If we placed the gage glass lower connection an inch and a half above the top of the sheet or the cone where it is riveted on, the lower connection of the gage glass then would be out of the oil on this trap. This was only illustrative as a patent proposition, and we never built one to conform with this. This was just gotten up for the Patent Office, to show this valve in the upper part here. I realized that the oil might reach that level. Now that float would have been submerged to two or three feet if I had figured on using that type of float. I never built one in accordance with that. I built my first trap practically according to what we are using today.

MR. WESTALL: That doesn't answer the question, but if the witness answers the question he would have to admit if he put a gage glass on the side of that trap, and everything else in proportion, with the oil level at the position as shown in that drawing, that that gage glass would surely register the full range of movement of that level; that the oil level would be at the bottom of the glass when the valve was in the position shown, and it would vary.

MR. F. S. LYON: We object to counsel's statements as not proof and not founded in fact, and that they are contrary to the testimony of the witness; and further, that the whole matter is merely a hypothetical

(Testimony of Milon J. Trumble.)
one which has no bearing upon the issues of this case, and entirely immaterial.

THE COURT: Counsel has given his view of it. Of course it is argumentative.

MR. WESTALL: But the witness has not answered the question, and has apparently avoided as much as he could answering the question directly.

THE COURT: He can answer it in this way: Assuming that you would put the same kind and length of gage glass on the tank and had put it so that it would show a level as illustrated here, would it be long enough, or could you see the level when the float would be at its extreme upper range?

A I don't know. That float could turn up perpendicularly. There is a hinge there. I don't know the length of that float arm. It would register in the glass and would show in the glass, but I couldn't tell by this whether this float arm is 20 inches or 30 inches long. Our regular gage glasses are generally 18 inches.

Q The question is, when the level got to its highest point would it still show in the glass or would it be beyond the glass?

A If the oil level would raise to the level where that float was perpendicular I don't see anything to prevent it from going on up and closing that valve in the top. Why would it force that float up to that level and stop at that point?

Q You mean it might not show in the glass then?

A It wouldn't show in the glass above that.

(Testimony of Milon J. Trumble.)

Q BY MR. WESTALL: Isn't it a fact that your low baffle plates in the earlier traps—there was four plates that have been referred to—interfered with the action of your float at the upper range of its movement?

MR. F. S. LYON: We object to that statement. Counsel says four baffle plates, and I don't know of a single trap that is shown in evidence here that had four baffle plates.

Q BY THE COURT: Did you have any with four baffle plates?

A I don't remember of four. We might have. I wouldn't say positively we didn't build a trap with four in, but to my knowledge I don't remember of any such.

Q BY MR. WESTALL: Can you answer the question on the assumption that you did put in four baffle plates?

A Read the question, please.

Q BY THE COURT: If you had four would it have interfered with the float?

A That would depend where they were placed. I would like to see one and I will answer the question.

Q BY MR. WESTALL: Referring here to Defendants' Exhibit P.

A What is it now you want?

Q Isn't is a fact that those baffle plates would obstruct the action of your float at the upper range of its movement?

(Testimony of Milon J. Trumble.)

A The bottom of that inner trap, if we set the float to a level above the vertical part of the float axle housing, there might be a chance in some extreme condition that the float might hit that once in a very great while. There might be a chance, but if it did it would be an oil level that was above where we intended to carry it. That would be 45 degrees there.

Q BY THE COURT: That would be the maximum range it would hit?

A Well, this Klipfel valve never allowed the float to make the full 45 arc, and we never set a valve right down in the lower position in these traps.

Q BY MR. WESTALL: Referring to Defendants' Exhibit P?

A Yes, sir. In turning the oil in the trap we always watched this arm come down, and when it would come down parallel here we would slip a bolt or key through this orifice in the float arm, and that would determine our level.

Q It is a fact that you did have trouble with the traps you furnished the Union Oil Company, of the float coming in contact with the pan or obstruction, or whatever you call it, extending below the lower baffle, isn't it?

A I won't say that that was the real trouble. They figured that there was too much saturation got over into that tank, and they cut a hole in the bottom of it to allow the oil to escape out of it. I might explain that in that internal trap the gas carried considerable moisture and condensation takes place in that

(Testimony of Milon J. Trumble.)
internal trap, and if it wasn't drawn off, after a time it would build up to a level where it would go out the gas line, and that would indicate that there was oil or foam or something coming over.

Q BY MR. F. S. LYON: In other words, the amount of condensation—

A It would accumulate to the height where it would go out with the gas.

Q BY MR. WESTALL: You have heard the testimony of certain witnesses who have stated that normally in traps such as illustrated in Defendants' Exhibit YY the oil level was at or above the top of the gage glass as shown in that blueprint. Is that correct? Is that in accordance with your experience?

A That would be in accordance with my experience, because the gage glass only indicates the danger line and that is all it was put on there for. It means nothing to the trap or to the operator, more than showing if he would take the pains to blow out the gas—to indicate the danger line when the valve is cutting out or unsealing the discharge pipe.

Q There was another danger line at the other end, was there not, and that was the danger of the oil going over into the gas line that had to be guarded against?

A That part of its was so obvious that we eliminated the valve to close the gas line.

Q BY MR. F. S. LYON: You mean valve 33 of your patent?

A I think that is the number. Well, I believe it is valve 30.

(Testimony of Milon J. Trumble.)

Q Well, operated by the float 33?

A By the pan 34.

Q BY MR. WESTALL: Do you testify that there is no value in the valve to close the gas line?

A That is a talking point, and there might be something in that in some certain instances.

Q Isn't it a fact that you testified yesterday that one of the very advantages of the new Lorraine trap was that it had these synchronously operated valves?

A He claims that. I think that is one of his big talking points in selling his trap.

Q Didn't you testify that purchasers and the trade generally have referred to that as a reason why they buy Lorraine gas traps?

A These men referred to me about that valve and said that there was something mysterious about that valve; that they couldn't understand it themselves; that that trap with that valve on was capable of forcing the oil through that trap into the top of the run tank, which was six, eight or ten feet above the outlet of the trap, without any pressure on the trap. They said they couldn't understand it but it was actually doing it, and I said it was impossible. So I satisfied myself that it couldn't be done, and to show to the people who were operating, McBurrows and his men, I got a valve and went out with Mr. Townsend and Billy McGraw and we took off the Lorraine pressure gage, which was a 300-pound pressure gage, as I remember, and put on our gage, which registered from

(Testimony of Milon J. Trumble.)
six to eight pounds, six pounds on one trap and eight pounds on another.

Q You stated, as I understood your testimony yesterday, that you have only made three traps such as illustrated in Defendants' Exhibit HH.

A To my memory I think we changed that cone or partial cone bottom to a bumped bottom. That was the principal change in that.

Q How many of the bumped bottom traps have you made? Do you know?

A We have made a great many. I don't know, I am sure.

Q Why didn't you, in making up your model, make a model of the trap that you are actually making at the present time?

A I think that is the patent in suit.

MR. F. S. LYON: If your Honor please, we object on the ground that that is not cross-examination. The witness hasn't been examined on that, and it is perfectly obvious that this particular witness had nothing to do whatever with the making of these models. Mr. Townsend has been on the stand, and he has explained that he had the models made under his instructions.

Q BY THE COURT: Did you have anything to do with the making of this model?

A I did not.

Q BY MR. WESTALL: Please state whether or not this correctly shows the trap that you are now

(Testimony of Milon J. Trumble.)
making and of which you have made the largest number, Plaintiff's Exhibit 26?

MR. F. S. LYON: We object to that on the ground it is not cross examination.

MR. WESTALL: I think he has testified how traps were made.

THE COURT: I think as a matter of comparison he may state, if he can.

MR. F. S. LYON: What is the question? Was it as to dimensions, or mode of operation, or what?

MR WESTALL: He can't show a mode of operation in a picture.

Q BY THE COURT: Does that or does it not indicate the kind of trap counsel has referred to as being generally manufactured by you?

A I think, looking at the picture, it is something along the order of the trap we built.

MR. WESTALL: Mr. Gutzler was going to furnish us a blueprint of this trap that they sold to the Superior Oil Company. Have you got that blueprint? This is the trap that we bought from the Superior Oil Company.

MR. F. S. LYON: I will look it up. You should have asked for it. Mr. Gutzler was leaving town yesterday morning and I supposed you had everything you wanted out of him, but I will endeavor to get that print, if I can, for you.

MR. WESTALL: He said he would produce it, and I supposed he would eventually bring it in.

(Testimony of Milon J. Trumble.)

MR. GRAHAM: My recollection is he was requested to bring the sales slips and he brought those to court.

MR. F. S. LYON: However, Mr. Westall, if you want that print I will endeavor to locate it.

MR. WESTALL: If you would admit that this correctly shows your trap—

THE WITNESS: I don't admit it correctly shows it.

MR. WESTALL: It is made to scale, and we have the trap, if you want to see it.

MR. F. S. LYON: It doesn't correctly show it, because you put in features that are impossible.

THE WITNESS: That float does not submerge, I don't think, in oil. It would be a very light oil if it would submerge half way on the float. I have observed it on 30 gravity oil, and it only submerges about one-third, and it wouldn't come anywheres near that on water.

MR. GRAHAM: If the Court please, that drawing on its face shows it couldn't have been made with a water test, because the water level is above the manhole and they couldn't see it. They couldn't have filled it that high and have observed the float.

MR. WESTALL: We would like to have the Court come out and look at the actual trap.

THE COURT: It may be possible they can produce the print from which they made that particular trap.

MR. GRAHAM: We will endeavor to do that, your Honor.

(Testimony of Milon J. Trumble.)

MR. WESTALL: And we also offered to fill the trap up with oil or water so that we could test the float, so that the Court could see just exactly what the conditions were in the trap. That would be the best possible evidence and we will do that whenever the Court desires.

THE WITNESS: We have several traps of the older type, or the earlier type, at my laboratory in Alhambra, which we can show the Court. We are not trying to cover up anything. There is nothing mysterious in this at all. We trap the gas from the oil and the gas separates readily from the oil and is trapped off.

MR. F. S. LYON: We have no objection to the Court seeing any of these installations as long as they are shown under actual conditions, and if the Court thinks it could gain any information we invite the Court to go to the oil fields to see them. We will endeavor this afternoon, though, to produce the blueprint that counsel has referred to.

MR. WESTALL: If the Court could arrange to go to the oil field we would like it very much, because we would like to show these Trumble traps they have been testifying about, these traps out at the Union Oil Company, and see what the oil level is in them, if that can be arranged.

MR. F. S. LYON: We of course, your Honor, know nothing about what the level they are referring to is. We can upon proceeding to the properties touch none of these traps unless we get special permission.

(Testimony of Milon J. Trumble.)
If they are in operation we are not permitted to touch the traps or to operate them at all.

MR. WESTALL: We will undertake to get the permission and relieve you of all of that trouble and go to the traps and show the Court the oil level of the traps, all of them.

MR. F. S. LYON: I don't know of any particular reason at the present time why the Court needs to, but if the Court desires to do so we have no objection.

THE COURT: We will leave that to be determined when we reach the time for argument.

Q BY MR. WESTALL: Isn't it a fact it would be an advantage to have the gage glass high enough to show the extreme upper level of the oil so that you might guard against the oil going over into the gas line?

A With our valves that we are operating now I would say it is all right to place it in that position, because we have a positive valve that when it closes it stops the outflow it wouldn't make any difference. Really the glass has nothing to do with the operation of the trap and pet-cocks would do just as well, or we don't need any. We can tell by the float arm.

Q. If you had a pet-cock or series of pet-cocks on a trap you would have some high and some low, wouldn't you?

A They could be placed any place that you wanted on the trap.

Q You would have several of them?

(Testimony of Milon J. Trumble.)

A I think Lorraine has two.

Q And the upper ones would be to guard the operator from having his oil level too high so that there would be danger of it going over into the gas line?

A I don't know what you mean by the oil level too high. I have operated a Trumble trap with the entire lower cone submerged in oil. I did that at the General Petroleum plant with two men who were paid by me, and I operated the trap for about ten months at the General Petroleum Company plant, and I cut the holes in the trap myself and put pet-cocks in them, and I determined for my own satisfaction what the great danger was, and I operated that trap and I could operate it with the lower cone submerged entirely with no danger of the oil coming over into the gas line.

Q. BY MR. F. S. LYON: When was that?

A That was in 1917.

MR. WESTALL:

Q About what time in 1917?

A I think I started there in February.

Q It is a fact that if the oil level was normal at or near the top of the gage glass it would have no function at all in advising the operator or warning the operator when he had too high a level, is it not?

A Very few operators would take the pains of going up and closing the lower gage covk and then opening the pipe and the gage cock below and blowing out the gas to determine the oil level. He would sight or see the float arm, and that would indicate to him sufficiently.

(Testimony of Milon J. Trumble.)

Q Is it not a fact that at the very present moment, to your knowledge, there is a very large number of Trumble traps, absolutely dozens of them, in which the oil level is near the bottom of the gage glass?

A I don't know of any myself. I don't see why they should operate it there, because they have all the means in that trap to operate it at a higher level. If the men in the field saw fit to operate it at a lower level, that is their privilege; but we advise them to operate it at a higher level. And we have. There is nothing mysterious about that. We have always advised them to carry a high oil level. I always advise Mr. Rae as a salesman to recommend that to everybody in the field, and we have placed on the trap the means by which they could regulate the oil level at will.

Q Well, will you say that you have not seen dozens of these traps near Los Angeles operated and being continually operated with the oil level down near the bottom of the gage glass?

A I won't say that, because I never saw dozens of them, and I don't think I ever saw any, with the oil level away down at the bottom. I have gone out in the field and packed the stuffing box on the side of the trap myself—carried a wrench and unloosened the nuts and put packing in there and tightened it up when the oil was running out of the stuffing box and down in a stream. Now that would indicate it was below the oil level in the trap. If it was in the gas it would fizz or belch and fuss.

(Testimony of Milon J. Trumble.)

Q BY MR. F. S. LYON: Is that the stuffing box you refer to?

A On the center manhole plate.

Q BY MR. WESTALL: Why did you abandon the construction with the conical bottom?

A Why did we abandon that construction?

Q Yes.

A We discontinued setting the traps up in the air. We set the traps on a level with the flow tank.

Q Was it customary to set your traps up in the air?

A That is the proper place to set a trap today, and always will be. If they do set the trap as it should be set up, then a well can pump into the trap after the gas pressure has been entirely relieved, and there is a big saving of pumping the oil into the trap and letting it run through the trap and not expose it to the atmosphere or air.

Q When was the change made from the conical bottom to the cylindrical form bottom of trap?

A I can't say just exactly.

Q Was it in 1921 or 1922?

A I think in 1920 or 1921—the early part of 1921. There is nothing in that feature. The old trap we built was just as good and will operate just as efficiently. And, as I said before the only quiescent oil in the trap has to be below the outgoing oil or the out-pipe. That is the only *quescent* oil. The oil below that pipe is in a dead position, and is never drawn off without—because it is a cooler zone; the hotter oil

(Testimony of Milon J. Trumble.)
stays near the surface and is in continual roll—foaming—or not foaming, but it is agitated by the current of oil coming in, and the oil below your discharge pipe is quiescent and stands there until somebody comes along and opens up the valve on the bottom of the trap and releases it; so that it is necessary to have a large separating or setting chamber below the valve.

Q Now you have stated that you tried some experiments with the lower cone submerged in the oil.

A Yes.

Q Was there any pressure on that trap?

A I ran that trap at various pressures from atmospheric pressure up to 100 pounds pressure.

Q Is it not a fact that if there was pressure on that trap it would push that oil right up into the gas line?

A I would say not. No, sir. It has a plane in the trap, and it seeks a certain level, and is level—not in lumps, ridges, or anything of the kind. The oil lays as a plane in the trap, and the pressure of the oil helps to hold the oil more dense.

Q Now why didn't you design and keep your traps made in 1914 and 1915 with a vertical float and a horizontal bottom of the trap as illustrated in the tin model Defendants' Exhibit HH, but with the square bottom of the later traps?

A As I say, we were setting the traps up on a pipe at that time. That is why we used the conical bottom.

(Testimony of Milon J. Trumble.)

Q Why didn't you use the vertical float?

A We were running high pressure traps. Some of them were very high pressure, and at that time I had not discovered a means to operate a cylindrical float made out of light material without causing collapsing of the float under high pressure. I didn't come out with a pneumatic float and use that as a feature, but I pumped up the float with air, and would prevent the float from collapsing by pumping air into the float.

Q In other words, you didn't know how to successfully make a trap at that time with a large vertical float in it, did you?

A We successfuly manufactured traps at that time; and I will take any one of those old traps and operate it as successfully as any trap operating today. There is nothing different from the separating features—the same volume and practicaly the same dimensions. We have straightened out the sheet, which makes it easy to set it up on the ground where we want to set the traps near the tanks without placing it on a pedestal or pipe.

Q Well, at that time, in 1914 and 1915 and subsequently, the fact is that you did not know how to make a trap with a vertical float, did you?

A I have used vertical floats—I have been in the refining business, Mr. Westall, since 1906. I operated stills with floats, with no pressure, vertical floats, so I understood all about the vertical floats; and I have been in the refining game since 1906 experimenting with different devices, and I operated the vertical floats.

(Testimony of Milon J. Trumble.)
But that vertical float, if any pressure would come onto it, it being made out of light material, would collapse. That is why we didn't use the vertical float in the gas trap where we had to run some of them as high as 200 pounds pressure. In the refining we carried no pressure. But in dephlegmators we used vertical floats to carry a certain level of the heavier distillates.

Q Now if those earlier traps with the ball floats and conical bottoms were as successful as those that you make today, why didn't you continue to make them? Why did you change the construction?

A How we came to change first was that we couldn't buy the Klipfel valve; the Crane people didn't have them in stock. Then I had to build a valve or design a valve, which I did, a butterfly valve, and it took some pressure to operate it. Then I designed the slide valve. Then I saw it was necessary to build a float that would operate that valve, which I did.

Q Could you use the Klipfel valve today if you desired?

A Absolutely.

Q Then if those old traps were successful and you could now use the Klipfel valve, why didn't you continue that construction up to the present time? Why did you change it?

A I developed a better valve than the Klipfel valve.

Q Then it is not a fact that your late model trap is any more efficient or any better as a separator than

(Testimony of Milon J. Trumble.)
the early forms of traps, shown in Defendants' Exhibit YY for instance?

A The earlier model traps have practically the same displacement in the top of the trap and the same separating means. They haven't changed the function at all. You can separate as much oil in No. 2 or No. 3 traps as the present No. 2 or No. 3 trap, or No. 1 trap, today.

(Last question read).

A No. If you want it answered that way. I will place a base on the other trap if you—just for the sake of setting up in the field, or the looks of it. Any of the old traps. But they operate absolutely the same.

Q Would you be willing to make a test of one of the Lorraine traps as against one of those old form traps at the present time?

A Yes, sir.

Q You think that it would show just as high an efficiency?

A I know it would.

Q And that it is just as good a trap?

A Yes, sir.

Q Now Mr. Lorraine says he will be glad to make that test in the presence of the Court.

A All right.

MR. WESTALL: If Mr. Trumble wants to make the test we will be glad to make it and show the Court the relative efficiency of the two types of traps as to operating and everything else.

(Testimony of Milon J. Trumble.)

MR. GRAHAM: Is this the trap of the Lorraine patent you are talking about, or one of your latest traps, the construction of which we know nothing about?

MR. WESTALL: No, it is not one of the traps you know nothing about; it is one of the traps like the Lorraine patent that we are suing on.

MR. F. S. LYON: We are not at all interested, your Honor, in the comparative values—

THE COURT: I suppose the degree of efficiency is not especially in issue.

MR. F. S. LYON: No; or whether the model or trap as they make and sell it is more efficient than the earlier or present day Trumble traps. However, if the Court thinks that any of these tests or any such inspection would assist the Court in any way in arriving at this question of invalidity or infringement, we would be pleased to have the Court proceed in such an examination.

THE COURT: I would prefer to take the testimony of witnesses on the subject.

MR. WESTALL: If the Court please, our contention is not that these old traps—

THE COURT: Suppose I should go out and see them in operation, what could I determine from it? I do not think I could determine very much. I can understand the witnesses when they testify and tell me their conclusions and their reasons, and can get something in my mind to work on, but from seeing a trap in operation, and all closed, I don't think I could de-

(Testimony of Milon J. Trumble.)

termine very much. I might have them measure the gas and tell me how much gas they are getting and where the oil level is, and all that sort of thing, but I don't think it would be of very much assistance. If you want that comparison made outside of the Court and wish to produce testimony as to what the result was, that is material perhaps.

MR. WESTALL: We have often taken Judge Trippet out to look at traps and devices, and a good many times they could be understood a great deal better by actual inspection in the field than from testimony in court.

THE COURT: Well, if that means just as a physical operation of the things that are inside, that is one thing. I suppose that is true. That is an object lesson. But what the trap is doing and what its capacity is and how efficiently it is doing its work must be termined by a secondary test. An engineer or a person who is familiar with it can tell me better than I can understand by standing there and having it shown to me, I think, as to what the thing does. I could see it operate in so far as the external parts of the apparatus are visible, of course.

MR. WESTALL: Of course, to keep the matter clear before your Honor, we are not contending that the Trumble traps would not work or were not efficient or would not do certain things. All we are claiming is that we have an improved trap by reason of these features described in our claims, and that our

(Testimony of Milon J. Trumble.)

trap is better—that that combination of elements works better.

THE COURT: Yes, and you claim that they adopted your features in order to gain efficiency.

MR. WESTALL: In order to increase the efficiency of their trap, yes. It is just a question of mere degree of efficiency and other things that makes a trap salable.

THE COURT: Yes.

MR. WESTALL: Mr. Lorraine suggests that if it would be of any assistance to the Court we would be willing to call in unbiased persons who have knowledge of these things and have them measure the efficiency or test the efficiency by different means known to engineers to determine which is the better trap, to compare the two, and to give the Court figures. We will make any arrangement like that that the Court may suggest, and will be glad to do it.

MR. F. S. LYON: I suggest, your Honor, that we should proceed with the evidence. I did not know we were going to endeavor to sell your Honor either a Trumble or a Lorraine gas trap, and that is the question of this efficiency. Unless there is some change in mode of operation or some change in physical or mechanical features, there is nothing patentable. Now the mere matter of degree, of change, in size or proportion or form, is not patentable.

THE COURT: Well, I will leave that to the parties, of course, to choose the evidence and produce it;

(Testimony of Milon J. Trumble.)
but I do not think I would want to attempt to select someone to go out and make a test. You may produce such testimony as you desire.

MR. WESTALL: Particularly, if we were given an opportunity of that kind, or the Court saw fit to have tests made, we would test the same trap with a low oil level and with a high oil level, and we would show the Court the increase of efficiency resulting from carrying the oil level at the point designated in the patent sued on over that with which we know these old Trumble traps operated, and which we will prove on rebuttal.

Q What are the advantages of the vertical float over the ball float?

A I might say that the float which I designed is an uncollapsible float. A ball float of the same diameter would probably operate just as efficiently as that longer or elongated float.

Q It is necessary, of course to have a greater depth of oil when you use the vertical float than when you use the ball float, is it not?

A I don't think it is. The vertical float never submerges, at the outside, more than half, and we have an arm in the chamber—or we could—and that we lower—that is, straighten out the sheet or conical bottom to a straight sheet and rest the cones or set them together in the top of the trap. They are all the same features, though. We didn't change any of the functions at all as far as the cones are concerned.

(Testimony of Milon J. Trumble.)

Q Of course those changes were made so that you would have room for your vertical float, were they not?

A Well, we shoved them up in the trap. There might have been some particle that—probably that was partly the reason.

Q And of course the vertical float extends down deeper in the oil than a ball float, does it not?

A No; I think a ball float of the same dimensions wouldn't go any deeper, to speak of, in the oil. That float is much larger than the ball float, you will notice, that we used to build.

Q Now at record page 713, line 25, you testified that you always recommended that the level of the oil should be about even with the float axle in the housing.

A We did in the older traps, as I say, because, on account of the inefficiency of the valve—that is, the valve would leak out, and we had to carry a high oil level to compensate for that leakage in that valve.

Q Your present valve is quite efficient and you would not need to carry a high oil level for that purpose now, would you?

A I don't think we do carry an oil level up even with the center of the—because the valve does close and is positive when it closes.

Q Now when did you first make any such recommendation in regard to the oil level?

A Well, I think when we put these slide valves on they were recommended then to set the oil level where

(Testimony of Milon J. Trumble.)
it would operate. The float would operate in any position we wanted it to operate, and there was no particular oil level set as I know of. I don't remember setting any particular oil level since I put on the new valve, because I am sure the new valve will close the valve and the float is placed high enough above the outlet—or the outlet pipe is submerged enough so that if the valve closes in a 30 degree arc there will never be any danger of breaking the seal.

Q Well, I was talking particularly of when you first made the recommendation as to the old traps that the oil level should be carried even with the float axle.

A Oh, the old traps?

Q Yes.

A I think that was my first recommendation.

Q In 1914?

A Yes. We had to take those Klipfel valves—and I inspected them myself—take them and turn off the valve so that it would work, because it was a sleeve and it fit so tight in the valve they wouldn't work unless you turned it off. Then I knew that a certain amount of oil would leak out of that valve, and in order to insure a seal I recommended carrying the oil level somewhere up near the float axle housing.

Q Have you ever recommended that the level be higher than about even with the float axle housing?

A I have set the level higher myself, yes.

Q Under what circumstances did you set it higher?

A It was on a head well.

Q BY MR. F. S. LYON: When?

(Testimony of Milon J. Trumble.)

A I think that was in 1920.

Q BY MR. WESTALL: Now why did you only build three traps like Defendants' Exhibit HH?

A I just can't recall that—

MR. GRAHAM: Let the witness see the exhibit.

(Mr. Westall exhibits model to witness).

A There might have been more built with that shallow cone—more than three—but I am not sure. We changed it, as I say, to a bumped head bottom.

Q BY MR. WESTALL: Why did you only build that small number of traps?

A We placed a base on the trap, and I wouldn't say just how many of them were built.

Q No, but I am asking you why you didn't build more of them.

A So that we could put a short base on the trap and not have too long a body on the trap and a great amount of material. It was because I thought it was not necessary.

Q BY MR. F. S. LYON: Is your Honor familiar with what the witness refers to as the base? Pardon my interruption, but I would like to have the testimony intelligible (exhibiting model to Court).

THE WITNESS: This is the base which we set the trap up on.

THE COURT: A support?

THE WITNESS: A support.

Q BY MR. WESTALL: Now referring to this slide valve, Defendants' Exhibit GG, that valve is equipped, is it not, with some kind of a bleeder?

(Testimony of Milon J. Trumble.)

A I think the oil valves—we equipped them with—let me take it and I will illustrate to the Court. I think there is a boss on the bottom of the valve, on this side, a valve placed there so that you can get some of the oil out of the trap if for any reason anybody wants a sample. They can open the valve and get a sample of it. But for no reason particularly, more than that.

Q BY MR. WESTALL: What do you say was the purpose of that?

A If you wanted to get a sample of oil out of the trap it would be easy to get it out of the lower portion of the valve.

Q Is it not a fact that the purpose is to get the sand out of the valve when it becomes stuck?

A Yes, you can see this construction of this valve. It opens at the lower periphery first, so that the current would be absolutely sweeping right over that little opening. The oil would absolutely have to pass right over that, so that it would sweep off any sand or anything. If the sand would collect in that it would clog up the whole 4-inch pipe. We use a 4-inch valve.

Q To what extent have you traveled out in the field and observed the actual operation of the traps?

A Well, I have been in the fields since I put the traps in the fields. I have gone through the fields quite often; I drive through the fields and look over the traps.

Q BY MR. F. S. LYON: Is that limited to California?

(Testimony of Milon J. Trumble.)

A In California, yes.

Q BY MR. WESTALL: Have you been doing that regularly since 1914?

A Well, off and on.

Q What particular duties do you now perform in connection with the manufacture and sale of these gas traps?

A I don't do anything particularly in their manufacture; I sometimes go down to the Western Pipe & Steel Company and look over the work; but the sales of traps I have nothing to do with. Mr. Rae is my sales manager.

Q Beginning in 1914, did you take an active part in the manufacture of traps?

A We had them manufactured by the Western Pipe & Steel Company, and I used to go into the plant lots of times and direct some of the work.

Q You continued to do that from 1914 up to practically the present day?

A I do. I go into the Western Pipe & Steel Company factory quite often; yes, sir.

Q Now when did you first see the Lorraine original patent of which the patent in suit is a reissue?

MR. F. S. LYON: That is objected to as not cross-examination. The witness has not been asked anything about the Lorraine re-issue patent nor in any manner referred to either of the patents except, as a matter of fact, to explain to the Court the synchronous action of the valves, and it is immaterial when he first

(Testimony of Milon J. Trumble.)

saw a copy of the patent. He is simply an purely an expert witness to explain the synchronous and automatic action of the two valves.

MR. WESTALL: He is one of the defendants in the case, and they are setting up the defense of intervening rights.

MR. F. S. LYON: He has not been examined in regard to that subject at all. Mr. Townsend testified in regard to it, but not Mr. Trumble.

MR. WESTALL: He has already explained the Lorraine patent in suit.

THE COURT: The objection being that it is not cross-examination, it could not be cross-examination unless he had in some way referred to the reissue patent on direct.

MR. F. S. LYON: He has referred to the re-issue patent, but not the original, and this question is in regard to the original. As I say, your Honor, he has referred—and I think my recollection is absolutely correct, to the re-issue only in so far as references to the valve arrangement and not as to its date or any of those features, but just the mechanical question.

THE COURT: Let us have the question.

(Last question read).

THE COURT: I think, strictly, it is not cross-examination. The objection is sustained.

MR. WESTALL: Exception.

Q Now you have referred to the patent in suit. Is it not a fact that that bumped bottom that you put on your later traps was put on some time in 1922?

(Testimony of Milon J. Trumble.)

A I think 1921. I couldn't say for sure.

Q The first one was put on in 1921?

A I think so. I couldn't say for sure on that.

Q I wish you would give your explanation of the action of this vertical float and how it operates the valves—referring to the Lorraine reissue patent in suit.

MR. F. S. LYON: I do not want to be in error on an objection, your Honor, but it is my recollection that this witness was not even asked anything in regard to the Lorraine reissue patent itself.

MR. WESTALL: Surely he has been asked questions about the synchronous valves and their operation.

MR. F. S. LYON: We object on the ground that it is not cross-examination. I think I am absolutely correct. He was not given, as far as I can find in the record, the reissue patent. It is not cross-examination, and the patent speaks for itself. It is not the best evidence, and it is opening, by cross-examination, the testimony of the witness to subject-matter in which he was not examined. He was examined as to the synchronous valve assertions as a sales point in the fields in the selling of the Lorraine traps, but he was not asked anything in regard to the Lorraine reissue patent or the other patent. I fail to find it, and I have scanned the entire direct examination, and I will ask counsel for plaintiff to point out the point in the direct examination upon which he founds the question.

(Testimony of Milon J. Trumble.)

THE COURT: You may look that up during the noon hour. In the meantime we will take a recess until two o'clock.

(A recess was thereupon taken until 2 o'clock p. m.)

AFTERNOON SESSION.

2 o'clock.

MILON J. TRUMBLE recalled.

MR. WESTALL: That is all, Mr. Trumble.

MR. F. S. LYON: That is all. I now call your Honor's attention, so that it may be formally before you, to the fact that a bill of particulars was filed in this case in accordance with the order of the Court, and that in paragraph 1 of that bill of particulars the plaintiff stated that "One of the devices manufactured and sold by the defendants and which plaintiff alleges . . . . at Huntington Beach, California", and that is the device of Plaintiff's Exhibit 8 which has already been shown in evidence, and I suppose that inasmuch as that is amply proven to be a true print of that trap, proven by the testimony of Mr. McGraw, that there is no need of taking the time of the Court to reproduce that proof. Is there, Mr. Westall?

MR. WESTALL: What do you mean? To prove an infringement?

MR. F. S. LYON: No. The particular trap you sued on in your original bill of complaint was this

Trumble gas trap on Amalgamated Well No. 7, according to the bill of particulars.

MR. WESTALL: No, we didn't stand on that; that is a mistake. We didn't stand on that particular device. They asked us to tell them what particular kind of a trap it was, and we mentioned that as one of the devices.

MR. F. S. LYON: I am stating that that is one of the particular traps.

THE COURT: You want to identify that by the drawing? That is the only purpose now?

MR. F. S. LYON: That is the only purpose now, and the particular trap of that specification in the bill of particulars is Plaintiff's Exhibit 8.

MR. WESTALL: If that shows in the record it is all right. I don't think that it does.

MR. F. S. LYON: It is in the previous record and I don't wish to take the time of the Court to put Mr. McGraw on the stand.

MR. WESTALL: If there is any point to it I would rather have it proven, because I don't remember anything about it, Mr. Lyon.

(Testimony of William McGraw.)

WILLIAM McGRAW,

called as a witness on behalf of the Defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. F. S. LYON:

Q What is your name?

A William McGraw.

Q And are connected with the defendant, the Trumble Gas Trap Company?

A Yes, sir.

Q You testified in the previous trial of this case?

A Yes, sir.

MR. WESTALL: I don't see the materiality of the evidence at all, your Honor, because we have relied upon the showing in that blueprint as infringement and any particular trap it would seem to me made in accordance with that wouldn't make any particular difference.

Q BY MR. F. S. LYON: I show you Plaintiff's Exhibit 8, in the corner of which appears in handwriting "Dimension checked with trap No. 687 on Amalgamated Oil Company's Miley Keck No. 7 Well at Huntington Beach, July 8, 1923, William McGraw." Do you know anything about that endorsement?

A Yes, sir.

Q State the circumstances.

A I took this blueprint to that particular trap and checked the dimensions with it and wrote this on here myself.

(Testimony of William McGraw.)

Q And did the trap of the serial number of that endorsement exist at that particular well?

A It did.

Q How did it check with the dimensions, proportions and devices of this print?

A Exactly so.

MR. F. S. LYON: You may take the witness.

MR. WESTALL: No cross-examination.

MR. F. S. LYON: I wish to offer in evidence the certified file wrapper and contents of the application upon which the original Lorraine patent No. 1,373,664 was granted and issued on April 5, 1921, of which patent the reissue in suit is a reissue or an amended patent, as Defendant's Exhibit A-8.

MR. WESTALL: It is objected to as incompetent, irrelevant, and immaterial, the suit not being on the original patent but on the reissue.

THE COURT: The objection is overruled.

MR. F. S. LYON: And also to offer in evidence the certified file wrapper and contents of the Lorraine application for reissue upon which application the reissue in suit issued, as Defendants' Exhibit B.

Also the following copies of United States patents, as Defendants' Exhibits as indicated:

Copy of patent to Rubin E. Beckley, 1,127,722, granted February 9, 1915, for oil and gas separator, as Defendants' Exhibit D;—

MR. WESTALL: We object to that patent as not having been mentioned or pleaded in the answer, as

(Testimony of William McGraw.)
required by Section 4920 of the Revised Statutes of the United States.

MR. F. S. LYON: It is for the purpose of showing the state of the art.

THE COURT: The objection is overruled; reserving the question, however, for your argument later, as to the particular form of the objection, as to its being a special plea of anticipation and not set forth in the pleading.

MR. WESTALL: Exception.

MR. F. S. LYON: Also patent to E. P. Shetler, No. 249,487, dated November 15, 1918, as Defendants' Exhibit E;—

MR. WESTALL: Same objection.

THE COURT: Same ruling.

MR. WESTALL: Exception.

MR. F. S. LYON: Also patent to Bray, 1,014,943, of January 16, 1912, as Defendants' Exhibit W.

MR. WESTALL: Same objection.

MR. F. S. LYON: That is actually pleaded, however.

MR. WESTALL: I do not find it in the list here, Mr. Lyon. Exception.

MR. F. S. LYON: Also patent to Albert T. Newman, No. 776,753, dated December 6, 1904, as Defendants' Exhibit X.

MR. WESTALL: Same objection—that it is not mentioned in your list.

THE COURT: Same ruling.

MR. WESTALL: Exception.

(Testimony of William McGraw.)

MR. F. S. LYON: Also patent to Newman, 856,-088, dated June 4, 1907, as Defendants' Exhibit Y.

MR. WESTALL: Same objection.

THE COURT: Same ruling.

MR. WESTALL: Exception.

MR. F. S, LYON: Also patent to Cooper, 815,407, dated March 20, 1906, as Defendants' Exhibit A-9.

MR. WESTALL: Same objection.

THE COURT: Same ruling.

MR. WESTALL: Exception.

MR. F. S. LYON: Also patent to McIntosh, 1,055,-549, dated March 11, 1913, as Defendants' Exhibit A-10.

MR. WESTALL: I find that is pleaded.

MR. F. S. LYON: Also patent to Barker, 454,106, dated June 16, 1918, as Defendants' Exhibit C.

MR. WESTALL: Same objection.

THE COURT: Same ruling.

MR. WESTALL: Exception. It is interesting to note, your Honor, that there were nineteen patents pleaded as anticipations in the answer and only one of the nineteen offered in evidence. Of all these others no notice at all has been given.

(Testimony of Paul Paine.)

PAUL PAINE,

called as a witness on behalf of the Defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. F. S. LYON:

Q Please state your name and occupation.

A. Paul Paine; engineer and oil producer.

Q Where do you reside, Mr. Paine?

A Beverly Hills.

Q What technical education have you had which, in your opinion, would tend to qualify you to testify as an expert in matters pertaining to the separation of oil and gas from oil wells?

A I received my training as a student in the Massachusetts Institute of Technology, from which I graduated in 1905. I came West and was in mining work for a few years, and in 1909 started working in the oil fields and have been connected with oil production operations since then, until 1917. I was in California in the latter portion of that period as superintendent of the Honolulu Consoldiated Oil Company. I then went to the Mid-Continent field in charge of field operations for the Gulf Oil Corporation. In 1920 I returned to California and have operated independently since then, having no connection with corporation work except for a period when I was on the Board of Directors of the Union Oil Company, and a year from June, 1922, until June, 1923, when I was vice president of the Shell Company of California.

(Testimony of Paul Paine.)

Q When you were with the Honolulu Consolidated Oil Company where were you located?

A In the Midway field, at Taft, California.

Q And as part of your duties there did you have anything to do with the operation of gas traps upon those wells?

A Yes, we had many flowing wells and utilized gas traps extensively.

Q What types of traps?

A The first traps which I recall are the old pipe traps, which were erected attached to the side of the derrick, and which were the antecedents of the present forms of automatic control traps. Then we had the equivalent of Stark traps, the McLaughlin trap, and in 1915, late in February or early in March, I installed our first Trumble trap.

Q That was a trap manufactured by the defendants in this case?

A Yes.

Q And how many of those Trumble gas traps did you install or operate upon the Honolulu Consolidated Oil Company's property while you were there?

A I don't know, but I presume somewhere around 15.

Q. Generally stated, what have you to say as to their success or failure in operation?

A They proved very satisfactory. They gave occasional difficulties, but nothing that could not be quite readily overcome, and they proved, of course, of great benefit and very valuable.

(Testimony of Paul Paine.)

Q How long since you have seen any of those traps on the Honolulu property?

A A week ago last Saturday, April 19 of this year.

Q And did you inspect them as to their condition at that time?

A I returned there and looked over some of them, not all of them. I observed traps Nos. 113, 115, 116, and a fourth trap from which the number plate had been removed.

Q Were these still upon the same locations as when you left the company?

A No, only one of them, and I am not absolutely sure of that. But I think one of them was in its original position where it was place in about 1916 or 1917; the others had been at wells which have ceased flowing and the traps have been removed to more recently completed wells.

Q Were these four traps which you have mentioned by serial number in use when you were there on the 19th?

A Yes, sir.

Q I show you Defendants' Exhibits A-5, A-6, and A-7, and ask you if you can recognize the traps of these photographs?

A No, I wouldn't attempt to identify these traps from the photographs. Of course they resemble the traps which I saw, except this one. This is a high pressure trap, and I didn't see it.

MR. F. S. LYON: That is the trap of Defendants' Exhibit A-5.

(Testimony of Paul Paine.)

Q Are you familiar with the construction of those Trumble traps as they were installed in 1915, 1916, and 1917 as you have testified?

A I am familiar with the outside construction, with that portion which was above the top of the shell, and with the portion which was visible upon removing the manhole.

Q What portion was visible upon removing the manhole?

A The inside of the trap, the float, and the cone. I have looked up there and seen one cone, but I have never gone beyond that.

Q You couldn't tell how many cones were in the trap?

A No.

Q Are you familiar with the mode of operation of those traps as they were used in 1915, 1916, and 1917?

A Yes.

Q Are you familiar with the mode of operation and general manner in which such traps perform the function of separating the gas from the oil?

A Yes.

Q Please explain this to the court and how those traps in 1915, 1916, and 1917 were actuated and controlled.

A Oil and gas have access to the trap at the top, descend on the top of a cone or umbrella-shaped device inside the trap, the fluid spreading out and the oil and gas separating, the oil settling to the bottom of the

(Testimony of Paul Paine.)

trap and the gas escaping through a gas pipe outlet which is contained inside of the oil and gas inlet. The oil outlet is attached to the side of the trap and contains this Klipfel valve made by the Klipfel Manufacturing Company and sold by the Crane Company. This valve is attached by a lever mechanism to the float on the inside of the trap, so arranged that as the fluid or oil rises in the trap it causes the opening in the outlet valve to increase so that more oil may escape from the trap. There is also an outlet at the bottom of the trap for the general purpose of withdrawing any accumulation of sand or water.

Q What is the character of the connection of the valve or valve-rod or -arm with the float arm?

A The valve-rod is attached through a lever and a stuffing box to the float arm on the inside of the trap so that there is a direct actuation from the float arm to the lever.

Q Is that a fixed and immovable connection?

A No, that may be adjusted. The moving of the valve to an open position may take place at one position of the float arm or at another position, or at practically any position that is desired within a certain range.

Q Did you observe that adjustment feature on those traps in 1915, 1916, and 1917? Did you have any occasion during those years to particularly observe or consider that feature?

A Yes, to the extent that it was set so as to maintain the level of oil at the point where we did generally maintain it.

(Testimony of Paul Paine.)

Q What level of oil did you generally maintain in 1915, 1916, and 1917 in those Trumble traps?

A The level was customarily maintained at a point about 1-½ to 2 inches below the top of the gage glass. I wouldn't say that there were no cases where it was lower, but I don't recall it.

Q How high up in the trap would that bring such level?

A I measured these four traps a week ago Saturday and found that that point is from three to five inches above the point which is midway between the top of the trap and the bottom of the trap, meaning by the top of the trap the top of the bumped head and by the bottom of the trap the bottom of that steel portion which is attached to the lower part of the cone, and not including any pipe or fittings or removable pieces.

Q Nor any of the stand-pipe on which the trap is mounted and which is in communication with the trap?

A No, nor the fittings.

Q How did that level as you have last referred to it correspond with the level of operation of these traps in 1915, 1916, and 1917?

A What I have just described to you was the level as maintained at that time. I don't know what it is now, definitely.

Q Now when the oil was maintained in these traps at that level what was the condition of the operation of the trap at that level of oil with relation to the valve being open or closed?

(Testimony of Paul Paine.)

A That was the point just at which the valve closed. Now if a head or gush of oil came in the level of oil would go up half an inch or an inch or so. There would be a slight movement of the levers, thereby releasing the oil. Sometimes more oil than that would come in, the oil coming in faster during a heavy gush than it would pass out through the outlet valve for a short time, and the level of the oil would then go up so high that it was above the top of the gage glass.

Q Have you had any knowledge or experience with gas traps since leaving the Honolulu Company?

A Somewhat, yes; both in Oklahoma and here in California.

Q What, based upon your experience with such traps, is there or could there be as a purpose for maintaining any particular column or height of oil in a trap?

A The only purpose which I can see, and that which we had in mind in operating these traps, was to have the level low enough so that there was no great danger of the oil going over in the gas line, and at the same time high enough so that with a leaky valve—and many of these outlet valves are leaky—the oil would not get down to the point where it had all passed out the oil outlet. That is known as breaking the seal. And in that way gas then would escape through the oil outlet.

Q Then what have you to say as to any such column of oil being necessarily relative to the position of the oil outlet?

(Testimony of Paul Paine.)

A Well, the height of the column of oil was something that received very little attention from us; just so long as it met the specifications which I have given to you.

Q In other words, the question of height of column had nothing to do with the operation except as required to keep an oil seal?

A That is all. I had never given it any thought, and had no idea of where it stood with respect to the middle of the trap until a couple of weeks ago when I took those measurements.

Q Now you heard the testimony of Mr. Lorraine as to the alleged advantages of maintaining a high column of oil in the gas trap.

A Yes.

Q You heard his statement in regard to sand separation?

A Yes.

Q Please state the facts in regard to sand separating out of oil.

A My thought is that a high column of oil does not provide a better means of separating the sand, necessarily, than a low column, the reason being that, obviously, the sand is going to separate from the oil if it is an inch deep more readily than it does from oil if it is a foot deep. And why I feel that way particularly is that we have utilized that principle in the problem of separating sand and water from crude oil. It has been not an unusual practice to separate water

(Testimony of Paul Paine.)
from crude oil in high, narrow tanks called gunbarrel tanks, and that was all right as long as these were present in small quantity; but in the Kansas fields very large quantities of water and considerable quantities of sand were found that came along with the oil, and in order to separate these we found that the most effective means was to build a long, wide, shallow pond and let the oil pass down through it and the water and sand, instead of having to descend ten feet, had to descend ten or eight inches.

Q Then based upon your experience what have you to say as to whether or not Mr. Lorraine's theory is correct that the sand will settle out more readily if there is a high column of oil maintained in the trap?

A Well, I think it is all a matter of speculation. I wouldn't want to say that he is wrong. I think the two factors are probably compensating. The oil remains in the trap—any individual particle of oil remains in the trap a little longer than it would if the column were not so high; but, on the other hand, the sand has farther to travel in order to drop to the bottom of the oil, and, just as a rough guess, I would guess that they compensate for each other.

Q Then what have you to say in regard to the oil that is passing into and out of the trap in the presence or absence of any current in the trap during such operation as affecting the sand settling from the oil?

A Well, I don't know about the current, whether it is there or not, and it is so speculative that I have no

(Testimony of Paul Paine.)

fixed idea; except that as to the sand settling, it would be most unusual if the sand were all to settle out. Because we find, especially in California crude oils, that there is frequently a very finely divided sand—we call it flour sand—which remains in suspension in the oil for a long time, and that is the sand which remains with the oil and passes out with it to some extent and which wears out these valves. Exactly that experience is now being had in the Torrance field.

Q That sand would take a very appreciable time in order to permit it to settle, would it?

A Oh yes; that sand would not all settle out during the time the oil remains in almost any type of trap.

Q Have you examined and are you familiar with the oil, gas, and sand separator described and illustrated in the Lorraine reissue patent in suit?

A I have read the patent.

Q (Handing document to witness) Having this patent now before you, will you please explain to the Court its mode of operation and principles and the principles of its connecting and controlling means, and compare the same with the Trumble gas traps that you operated in 1915, 1916, and 1917; and before doing that may I ask you if you are familiar with the Trumble gas trap as illustrated in Plaintiff's Exhibit 8 (handing same to witness)?

A Well, I have seen traps of this general type. I can't verify the different sizes.

(Testimony of Paul Paine.)

Q Well, I mean with this drawing. And in your comparison also compare the mode of operation and function of the device of the Lorraine reissue patent with the Trumble gas trap of Plaintiff's Exhibit No. 8.

A In the Lorraine gas trap as described here the gas and oil come in near the top of the trap and near its side, in a portion of the trap that is set off by a vertical partition from the second portion of the trap. This vertical partition has an opening at the bottom and at the top so that the communication between these two portions is established at the top and at the bottom. The liquids and solids settle down to the bottom of the trap; the gas passes upward and over the top of the partition and is withdrawn. The oil has an outlet at the side and passes out. There is also means at the bottom of the trap for withdrawing sand, water, and so forth. The principal differences are embodied in two features: the first of these relates to the inside of the trap and is this vertical partition, which has no counterpart in the Trumble trap; the second feature is the means for regulating the outflow of the oil. In the Trumble trap the outflow of oil is controlled entirely by opening the valve through the actuation of the float. As the float is raised the valve is opened wider and the oil escapes faster.

In the Lorraine trap there is an analogous device—a valve which opens as the oil level in the trap rises. But there works in company with this a valve on the gas outlet, so that as the float is raised and a greater opening provided for the escape of oil the space for the

(Testimony of Paul Paine.)

escape of gas is closed and narrowed down. This has the effect of preventing the ready escape of the gas which is coming into the trap from the well, so that the trap increases in its gas pressure. This gas pressure is exerted against the body of the oil and pushes the oil out that much faster. In other words, the oil valve and the gas outlet valve work synchronously, and this feature has no parallel in the Trumble trap.

Q Does the Shell Company of California use any of the Lorraine gas traps?

A Yes.

Q Do you know why it chose Lorraine traps?

A I have discussed that with the manager of production and the superintendents and—

MR. WESTALL: We object to any statement by the witness as to the reasons for preference, on the ground that obviously from the opening statement it would be hearsay.

THE COURT: I think that is true, Mr. Lyon.

Q BY MR. F. S. LYON: When did you have that discussion?

A Oh, I had that discussion several times during the time I was in the service of the Shell Company.

Q In other words, while you were one of the vice presidents in charge of operations?

A Yes.

Q And you discussed that with these people as the reasons for purchasing traps at the time?

(Testimony of Paul Paine.)

A Yes.

MR. F. S. LYON: We submit, your Honor, that under the—

THE COURT: If it was information gathered in the course of his business with the intent to learn that, and from his own people, he may testify.

MR. WESTALL: Exception.

Q BY MR. F. S. LYON: Why did the Shell Company of California purchase Lorraine traps?

A Because at that time the Company was completing a number of wells of big capacity, both oil and gas, and it was felt that this added feature of the synchronous operation of the gas valve and the oil valve would provide an additional factor of safety in handling these big flowing wells.

Q Do you know whether on any of those wells more than one Lorraine trap was installed?

A I do not. Not of my own knowledge.

Q Did you ever see an oil well with more than one Lorraine trap on it?

A I have seen several Lorraine traps put up together, side by side; but I can't say that they were connected all to just one well.

MR. F. S. LYON: You may take the witness.

CROSS EXAMINATION

BY MR. WESTALL:

Q What is your present employment or business?

A I produce oil on my own account; that is, my partner and I do; and I have a consulting engineering

(Testimony of Paul Paine.)

business. The largest portion of my time is given to the valuation and appraisal of oil properties, either in connection with trades and mergers or—and the larger portion of it for banks in connection with the underwriting of bond issues.

Q When did your first experience with gas traps begin?

A In about 1910, with the old style pipe traps.

Q And what was your business or employment at that time?

A I was foreman for the Hawaiian Oil Company at Fellows, California.

Q And as foreman what were your duties?

A I was in charge of the property—in charge of the work which had to do with the drilling and production and construction.

Q And how many wells?

A We had about twelve or fifteen.

Q What kind of traps did you have at that time?

A They were home-made traps, made out of pipe attached to the side of the derrick. The oil and gas were conducted into a vertical piece of pipe part way up, and the oil would settle to the bottom and the gas would come out at the top, and that gas was utilized for fuel purposes; but there was no control device or any of these modern improvements. That was a device which had been used in the oil fields for a long time.

Q Was there any sand in that oil that had to be separated out?

A Some.

(Testimony of Paul Paine.)

Q And did the trap take care of the sand?

A The minute that oil would go over it would take the sand right along with it into the tanks.

Q It didn't separate the sand; that is, the trap didn't separate the sand out?

A Oh, no; the trap consisted merely of pipe, and the oil continued flowing and carried the sand along with it.

Q There was no settling bottom in the pipe to take out any of the sand, then?

A Oh, no.

Q Now, how long did you continue to have experience with that kind of traps?

A Why, we used those traps at times up until—oh, probably 1914 or 1915. I can recall seeing such traps used since then. We had some in Kentucky in 1917.

Q When did your experience with that first Trumble trap begin?

A Late in February or early in March, 1915.

Q And what was your employment at that time?

A I was Superintendent of the Honolulu Consolidated Oil Company.

Q And what were your duties as superintendent?

A I was in responsible charge of the property. I was field manager, or looking after all the field operations, for Captain Matson of San Francisco in his oil operations.

Q How many wells did you have charge of?

A Oh, I presume there were forty or fifty; not over fifty.

(Testimony of Paul Paine.)

Q And how many gas traps at that time of the Trumble construction that you have referred to were used?

A None. Not at the time we started in.

Q Well, when you started to use them in 1915, I believe you said, how many did you order?

A One.

Q And was that immediately connected to a well?

A Yes; as soon as we obtained it.

Q Now what kind of a trap was that; can you describe it?

A It was designated as a No. 3 trap, and was heavier than the ordinary traps which they had been sending out to the oil fields. I wished to put this on a well which had a very high pressure and desired to save the gas at as high a pressure as was possible, so I told them to send me the best they had.

Q When that trap reached the property did you examine it before it was put in position or connected with the well?

A I looked at it.

Q Did you see any of the interior construction of it?

A I saw the ball float and lever and saw a cone up in the top. I don't know what there was above that—how many of these cones or umbrellas.

Q What kind of a valve did that trap have on?

A It had a Klipfel valve.

(Testimony of Paul Paine.)

Q Now that was immediately put in operation in 1915, was it, and it was continued in operation for how long?

A As long as I was with the company, which was until September, 1917.

Q It was still operating when you left the company?

A Yes.

Q Was that trap equipped with a glass gage?

A Yes.

Q And where was the glass gage located?

A As I recall it—and that is not one of the traps I saw the other day so I can't state definitely—but as I recall it the lower portion of the glass gage was a short distance above the row of rivets which attaches the sheet of the shell to the cone.

Q By a short distance you mean an inch or two?

A Oh, I would say probably three or four inches. An inch or two wouldn't take you above the row of rivets.

Q And how long was the glass, do you recall?

A My best recollection is that it was 16 or 18 inches. I just recollect that it was an unusually long length, because we couldn't get that out of stock from the supply companies and had to send to San Francisco for them. It may have been longer.

Q Do you remember the dimensions of that trap?

A No, I do not.

Q How did it compare with subsequent traps you got from the Trumble people?

(Testimony of Paul Paine.)

A I think it was slightly larger, and it was built much heavier, in order to withstand higher pressures.

Q So far as you know, however, of the same dimensions?

A I don't know. I think it was probably larger.

Q Did you notice the float arm inside of that trap, whether it was straight or bent?

A It was straight when it came to us.

Q Did you ever bent it or have it bent?

A No.

Q So that so far as you know it remained straight?

A So far as I know, yes.

Q Now what well was that trap put on?

A It was attached to Well No. 3 on Section 10, Township 2-24, at Taft.

Q And what was the name of the well?

A No. 3.

Q And what was the name of that company?

A The Honolulu Consolidated Oil Company.

Q And how far from Taft is that property?

A About six miles.

Q Now, did you have an opportunity to observe the level of oil that was carried in that trap?

A Many times, yes.

Q Through the gage glass?

A Through the gage glass.

Q And was the gage glass on the trap continuously from the time the trap was put in connection with the well until you left there?

A Yes.

(Testimony of Paul Paine.)

Q It never was broken?

A Not that I recall.

Q And where did you observe the oil level in that gage glass?

A As I recall the level carried then, it was about 1-1/2 to 2 inches below the top of the gage glass.

Q Now you say as you recall. Are you sure about that, or is that just a hazy recollection?

A I am fairly sure about it, for this reason: These traps were a curiosity in those days; they were extremely valuable to us in the money they returned to us, so that we were very much interested in their effective use, and the Trumble people were bringing a great many prospective purchasers out to look at them, and we looked at them ourselves a good deal, and many times I can recall that the oil level, where it stood an inch and a half or two inches below, would be standing there and then the well would make a flow and that oil level would rise until it went out of sight, and then I would be rather nervous until the well stopped flowing and the oil level got down again, because there was always a fear that the well might keep on flowing until it went over into the gas line. Now I wouldn't say it was an inch and a half or two inches, but my best recollection is that it was nearer an inch and a half than two inches.

Q You are sure it might not have been four or five inches?

A Oh, yes.

(Testimony of Paul Paine.)

Q Would it not have been an advantage to have that oil level also so that you would not have had that nervousness about it rising too high and going over into the gas line?

A Well, that nervousness disappeared after the first week or two, whereas the leaking of the Klipfel valve gradually increased as the sand cut it out and it began to give us trouble, and obviously the thing to do was to carry the level as high as seemed safe in order that the seal might not be broken on the oil outlet.

Q Now with the oil an inch and a half or an inch from the top of the glass you cannot recall, not knowing the dimensions of the trap, how much below or above the vertical center of the trap that oil level was, can you?

A No, I never gave it a thought.

Q Now with the level as you have indicated, an inch and a half, perhaps, below the top of the glass, what position would the valve be in as to opening or closing?

A Just closed.

Q So that the slightest upward movement—

A That is, on a head well, which makes oil for a portion of the time and then ceases making oil altogether. Now if the oil were coming from a well which flowed a little bit, which flowed a head and then kept a little dribble of oil right along, that valve would be a little bit open.

(Testimony of Paul Paine.)

Q Well, now, I am talking particularly about this trap that was put on Well No. 3, the very first Trumble trap.

A That valve was just closed when the oil was at an inch and a half to two inches below the top of the gage glass.

Q You are sure about that, are you. It was just closed?

A It must have been, because it stopped any further escape of the oil. The only theory upon which it could not be closed would be that the well was making some oil. Now in my best judgment the well didn't make oil between heads. If it did make oil between heads, and the level continued at the same spot, then the valve must have been open just enough to take care of that oil and permit it to leave the trap.

Q You have no means of knowing, have you, the range of that oil level from the position that you have indicated to its highest position when the valve opened and relieved the trap?

A You mean the float or the oil level?

Q I mean the oil level.

A Let me have that question again, please.

(Last question read).

A That is why I didn't understand your question, because you refer to the oil level rising at the time the valve opens and the oil goes out.

Q Yes; I am talking about the extreme fluctuations of oil level, what the fluctuation was in height of oil level.

(Testimony of Paul Paine.)

A Obviously, I couldn't know how far it went up when it passed beyond the top of the gage glass; and my observation is that it would at times go down in a range around two inches. It rarely would drop more than that. That is, below the point where it ordinarily remained.

Q Do you mean to say, then, that there would be a range of oil level of say two inches from the position an inch and a half below the top of the glass to the highest position?

A No, I don't know how high it could go, because it would pass out of the gage glass. But I have seen it drop down to a point a couple of inches below the general point, because sometimes the oil would get to sweeping out before the float would drop down sufficiently to close the valve.

Q You think the float sometimes would stick a little?

A It would stick a little bit, yes. That could happen very easily by getting the stuffing box connections too high.

Q Wouldn't that seem to show that if the level went down farther than an inch and a half the valve was partly open at the inch and a half position you have mentioned, instead of closed, and that it went down a little further to completely close the valve?

A No; the float would hang up.

Q Well, you would not know positively whether it would hang up or not; that is just your theory?

A I am giving you my best guess, yes.

(Testimony of Paul Paine.)

Q Well, if the level did go down say two inches or a little over, wouldn't that indicate that the valve was not quite closed at the inch and a half below the top?

A Not to me it wouldn't. It would indicate to me that the float had hung up.

Q Now do you remember what position the float arm was in outside the trap when the level was, as you have indicated, an inch and a half from the top of the glass?

A Oh, I would think it was about horizontal.

Q Now when did you next have any experience with a gas trap after that first one?

A Well, that one was so highly profitable that we immediately put in some more at various wells, or shortly thereafter, and it soon became our standard practice upon the completion of a flowing well to install a Thumble gas trap as part of the routine work of bringing in the well. I can't give you the designations of the wells where they were put on, although I can recall a good many of them.

Q Do you know how much oil and gas that trap on Well No. 3 handled?

A It handled 1200 barrels of oil a day and one million feet of gas per day.

Q Did the well make sand?

A A small quantity, but not a great deal.

Q Did you have trouble with that Klipfel valve cutting out?

(Testimony of Paul Paine.)

A We had some trouble upon that well with it cutting out, and more or less trouble in all instances.

Q Now with that particular well how often did you have to replace the valve or any part of it?

A I don't recall. The replacements were made from time to time, just enough so that I bought some extra parts so as to have them on hand for that work. But I don't know how often.

Q Do you know whether the valve would operate satisfactorily for as much as two or three months without any replacements?

A Oh, just as a round guess, now, I would say that probably the valve had to be changed oftener than that for some time, until the production from the well had declined and it was not producing as much oil, and gradually the percentage of sand in the oil becomes eliminated. So that, just in round numbers, I would say that probably it was changed every month or so for three or four months, and then at longer intervals. But that is nothing but a wild guess on my part.

Q To what extent did that trap separate the sand from the oil?

A It separated some sand, the larger and coarser particles, and there was some sand remained in suspension in the oil.

Q Did you have any other device on the oil line for further separating the gas or the sand from the oil on that particular well No. 3?

(Testimony of Paul Paine.)

A No, unless you would want to call the receiving tank a device for separating the sand from the oil.

Q There was no other special device for further separating?

A No; the oil went directly from this trap into a 5000-barrel tank, and from that tank it was delivered to the Standard Oil Company.

Q Did you have any other Trumble trap on that same well, acting in conjunction with the trap you have mentioned?

A No; it was alone.

Q Over what period of time did you observe the operation of that trap, and particularly the oil level?

A Over no period of time. As I have said, the oil level was a matter that we never gave a thought to particularly, outside of keeping it within the range I have indicated.

Q Well, I mean to say this, that from the time that trap was first put in—in 1915, I believe you said—to something like 1917 you had occasion off and on to look at the trap, didn't you?

A Yes.

Q And did you observe the level in the glass gage?

A A number of times.

Q And every time you looked at it you found that invariably the level would be in the gage about an inch and a half from the top of the glass?

A So far as I know. As I say, I don't recall a single instance of observing the oil level down low in

(Testimony of Paul Paine.)

the gage glass. There might have been cases, but I don't recall them.

Q But you do remember distinctly looking at the glass many times and seeing that level?

A Oh, yes. As I have told you, because these heads would come and the oil level would build up.

Q Now passing on to the next trap that was installed, do you remember absolutely the next well a trap was installed upon and what kind of a trap it was, its size and number?

A No, I don't recall the well. I am under the impression that it was probably Well No. 6 on Section 8, and I am quite satisfied that it was a No. 1 trap, that is, a lower pressure trap. I think we only had one or two of these high pressure traps on the property. We had some customers for gas at high pressure and some other customers for gas at low pressure. That is, if we could save the gas from the oil at a high pressure we could get a little more money for it, and we were supplying most of the gas which came down here for use in Los Angeles, as well as a large portion of the gas utilized in the Midway oil field, so that I desired to save the high pressure gas at a high pressure. Now there was comparatively little of such gas available from the flowing oil wells, and most of the traps which we obtained were these No. 1 traps which had a rated working pressure, I think, of 75 pounds or 100 pounds. The three or four I have just referred to were operated for a long time at 175 pounds pressure.

(Testimony of Paul Paine.)

Q Who was in actual charge of the inspection of those traps during the time you were connected with that company in the capacity you have mentioned?

A There was a production foreman who looked after them somewhat; there was a gas foreman who looked after them somewhat; there was a drilling superintendent who took an interest in them; and so did I. I don't think that was pinned onto any one person.

Q Can you give the names of the persons you have mentioned and their present addresses?

A All except one, and I think I have his address.

Q Will you kindly do so?

A Charles Hardisty;—

Q Who was he?

A He was production foreman. His address, I think, has been reported to me as Ardmore, Oklahoma. The gas foreman was E. Pratt. The drilling foreman was R. R. McGuire. And they are both still with the company at the same property. McGuire has succeeded to my position, and Mr. Pratt has moved up to be assistant superintendent.

Q When did you last see the trap you have been talking about on this Well No. 3?

A In 1917, so far as I know.

Q Now what other trap do you most distinctly remember of those old Trumble traps which you had the greatest opportunity of observing?

A That is difficult to place. I don't recall any one particularly.

(Testimony of Paul Paine.)

Q You had how many all together on that property under your supervision?

A I think probably twelve or fifteen. I doubt if it is more than fifteen.

Q Now none of those twelve or fifteen traps stands out in your mind more than any of the others at the present time, does it?

A Yes; there is one, I think, principally, because a photograph of it was used in the advertising of the Trumble Gas Trap Company.

Q What one was that?

A That was then designated as No. 6 on Section 8.

Q Was that the trap that is illustrated in the cut on the back of the Mining & Oil Bulletin?

A I don't know.

Q Would you recognize the advertisement if you saw it?

A I think I would recognize the picture.

Q I show you Plaintiff's Exhibit No. 24, cover sheet of the Mining & Oil Bulletin, and ask you if that is the cut you refer to.

A No. This was a picture of a derrick and trap as set up and operating in the field.

Q Where was that advertisement?

A In a booklet which they got out.

Q Is it shown in either one of these photographs A-6 and A-7 that were referred to by you on your direct examination?

A I can't identify those photographs.

(Testimony of Paul Paine.)

Q Upon what well was that trap you have last referred to used?

A Well No. 6, Section 8.

Q Do you know the dimensions of the trap?

A No, I do not.

Q. Or what the number of the trap was?

A No. Well, excuse me. You mean the size of it?

Q Yes.

A It was a No. 1, if I recall correctly. I am very sure that is right.

Q Do you know how much gas it took care of?

A No, I don't recall. It would probably range around a million cubic feet per day.

Q How many wells did you say there were that you had there that those traps were placed upon?

A Oh, I didn't say. I said we had about twelve to fifteen traps, and that we had about forty or fifty wells; but not that the traps were placed on all these forty or fifty wells.

Q Now what kind of traps did you use on the other thirty or thirty-five wells?

A On some of them we used no traps. On one we had a McLaughlin gas trap; and outside of some of these pipe traps on the very small pumping wells with a low pressure, that is all the traps we had except the Trumbles.

Q Now in that last trap you have mentioned, I believe on No. 6 well did you say,—

A Yes.

(Testimony of Paul Paine.)

Q Was that the same kind of trap, the same construction, as the one you have described with reference to No. 3 well?

A It was the same general type of trap, but it was not built as heavily as the first one we have been discussing.

Q The proportions, so far as you know, were the same?

A I think it was slightly smaller.

Q And where was the gage glass on that trap?

A My recollection is that the bottom of the gage glass was a few inches above the seam where the lower portion of the shell and the cone came together.

Q Have you any special recollection of ever observing the oil level in that gage glass?

A I just recall it generally as being near the top of the glass. I have no recollection of it being in the lower portion.

Q You have no recollection of any particular time or occasion observing that glass, have you?

A Oh, I can't give you any definite time, no.

Q Now as to these wells upon which the Trumble traps were connected, what were the conditions as to oil flow—were they similar to each other, or was there quite a difference in the manner in which the oil came from the wells?

A Oh, there was quite a wide variation in the amount of oil and gas coming from them and in the periods between heads and so forth. No two of them were alike.

(Testimony of Paul Paine.)

Q Can you describe just what the conditions were, taking up the different wells and telling about the periods between heads, and so forth?

A No, I cannot.

Q Can you give any approximation or can you describe in any way what the conditions were at those different wells?

A No; that is covering too much territory.

Q There was a wide variation, however, in the heads and the time, wasn't there?

A Yes, some wells would flow almost continuously even though they were making a small total daily production, whereas other wells might have periods of three or four hours between heads.

Q Did you have the same kind of Trumble gas traps attached to each one of these wells, or did the traps vary in size and construction?

A I think all the traps except two were this No. 1 size.

Q And all equipped with these Klipfel valves?

A So far as I recall. I don't recall any other valves on the traps.

Q Do you remember where the manhole was situated in each of those traps?

A No, I do not.

Q You don't know how far up from the seam between the shell and the cone of the trap it was?

A No. I never measured it.

Q How many of these traps did you observe the interior of?

(Testimony of Paul Paine.)

A Probably two, or—not more than that. The first one we obtained, and I recall another one, because we happened to have the manhole off that trap.

That trap as shipped from the factory had a composition gasket on the manhole, and I used to have those replaced with sheet lead gaskets, and the manhole was off at the time I came along, and I looked into the trap.

Q And were you bothered with any leakage of oil out around the manhole?

A Yes, there would be some leakage of gas in the upper portion of that manhole, and the lead was particularly desired in order to hold down the gas leakage.

Q Do you recall approximately the different times at which those different traps were installed?

A No. I should say that at different intervals they were installed as the wells were completed, up until the autumn of 1917. The latest one I can definitely recall installing—and I can't be definite about that,—was in August, 1917.

Q That was in August, 1917, according to the best of your recollection?

A Yes.

Q How did those wells vary in production? I suppose some were heavy producers and others not?

A None of them were over 1200 barrels a day. I should say from 100 barrels a day up to 1200.

Q Now I am talking of the wells only that were equipped with these Trumble gas traps.

(Testimony of Paul Paine.)

A That is what I am speaking of.

Q So far as you recall did they have all the same size traps on these different wells?

A All except two. I know we had one, and I think we had two, of this heavier and, I think, slightly larger size—this No. 3 trap.

Q The others were No. 2 traps?

A No, the others were No. 1.

Q Was No. 1 the largest size?

A No, it was the smallest, as I understand it. Anyhow, I am using No. 1 to designate what was my understanding of their smallest trap, the trap used for a working pressure of 75 pounds.

Q So that only on two of those wells did you have the largest size, No. 3 traps, did you say?

A No. 3 traps, yes. I think there were two.

Q Do you know which wells those two were on?

A One was on this Well No. 3 on Section 10, the first well we have been discussing; and where the other one was I don't recall, and I am not entirely sure that we had it, but that is my best recollection.

Q Now the other thirteen traps were on these different wells which produced all the way from—how many barrels—at the lowest?

Q If there were thirteen traps, all the way from say around 100 barrels a day up to a maximum of 1200 barrels a day.

Q And what is your recollection as to the oil level in all of those other thirteen traps?

(Testimony of Paul Paine.)

A My best recollection is that the oil level we commonly carried was from 1-½ to 2 inches below the top of the gage glass. I can't state that that was invariably the case, but I don't recall an instance where the oil level was carried lower.

Q And you were able to maintain that oil level as a somewhat uniform proposition on all those fifteen wells, if you are correct as to the exact number; is that correct?

A Well, we didn't seek particularly to get that exact inch and a half or two inch point; and of course if the valves were leaking and there was a long period between the heads of wells, the wells would go out and that level would descend somewhat.

Q You don't recall, however, of ever seeing it down lower than that?

A Oh, I recall seeing the level down lower than that, with a leaky valve when the oil would go down.

Q How low did you ever see it with a leaky valve, according to your recollection?

A Oh, I presume I have seen it down there two or three or four inches. It may have been more than that. I don't remember.

Q You don't recall any instance when the oil level was normally carried in the bottom of the glass, do you?

A I have got to get what you mean by "normally."

Q Well, you spoke about the regular level, the usual level, as an inch and a half below the top of the glass. You don't remember any instance that came

(Testimony of Paul Paine.)
under your observation where that level was carried say an inch and a half from the bottom of the glass?

A No, I do not.

THE COURT: Referring to its closed position, Mr. Westall?

MR. WESTALL: Yes, when it was in a closed position.

Q Now since 1917 what has been your opportunity, if any, of observing these gas traps or gas traps in construction?

A Considerable. In the Mid-Continent field—Well, I don't want to make too long an answer.

Q I wish you would answer fully.

A All right. It will probably take me all afternoon and tomorrow morning.

Q Well, go ahead.

A In the Mid-Continent field—

THE COURT: Just summarize it if you can.

A In the Mid-Continent field there is the reverse condition. In many cases it is desired to separate the oil from the gas when the gas is at a pressure of less than zero. Instead of a high pressure the pressure is a negative quantity. There is one condition. In Southern Oklahoma and North Texas during the period of 1918 and 1919 there was a great development of wells with a high pressure requiring traps of the general type under discussion here. In Kentucky during 1918 and 1919 I had a development on there for the Eastern Gulf Company in which we had small pressure separators, not using any of the types of

(Testimony of Paul Paine.)
traps which have been described here but an entirely different type. On my return to California I then for the first time saw the Lorraine trap. There had also been developed in the Mid-Continent field the so-called Smith trap and various other kinds of traps. Does that answer your question?

Q BY MR. WESTALL: In a general way, yes. Now when did you first become acquainted with the Lorraine trap?

A At the time of the suit of Trumble vs. Lorraine.

Q When you were called as an expert witness on behalf of Trumble?

A Yes. I had seen the Lorraine trap, I think, previous to that.

Q Now what do you understand, or what have you understood was the function of that gage glass on the trap?

A Our function was to show us where the oil level was.

Q Well, did you ever know of the gage glass on any gas trap that was not intended for that function?

A Not any that I have—

Q Now is it not a fact that when the level of the oil is above the top of the gage glass the gage glass performs no function in designating the level of the oil?

A No, except to show you that the level is above that point.

(Testimony of Paul Paine.)

Q So as an expert would you not say that the proper place for a gage glass would be so that it would show the extreme fluctuations of the level of oil?

A That would be one—

MR. F. S. LYON: We object to that question as immaterial, as to what he would have done.

MR. WESTALL: He is testifying as an expert.

MR. F. S. LYON: We are dealing with the facts as they are here, not the way he would have made a trap if he manufactured one.

THE COURT: I suppose you mean if it would be desirable to have it higher.

A Yes, sir, it would have been better to have had the glass higher.

Q BY MR. WESTALL: So that you could observe the highest fluctuations as well as the lowest; is that not correct?

A Yes.

Q Then if the glass was so located you would not need to be nervous about the oil going over into the gas line, because you could always see the highest point in the gage glass; isn't that true?

A Yes, sir.

Q Did you ever have any trouble with those gage glasses becoming so clouded up that you couldn't see the level in the gage glass?

THE COURT: The gage glass would have to be practically at the top of the cylinder in order to show that it did get up over the gas line, would it not?

THE WITNESS: Yes, sir.

(Testimony of Paul Paine.)

A Yes, the gage glasses would become cloudy; and sometimes it was with difficulty that you could discern what was the real level of the oil after their use over a considerable period.

Q BY MR. WESTALL: But if they got too much filled with dirt and too clouded you knew it was an easy matter to take them out and clean them, was it not, or comparatively easy?

A Yes.

Q You could always shut off the cocks at the top and bottom for the purpose of cleaning the glass?

A Yes.

Q Now did you have any other difficulty with those traps except the cutting out of the valves by sand?

A Yes.

Q What difficulties were those?

A We had the oil go over in the gas line on one or two occasions; not due to the trap filling up, but due to the fact that— May I refer to the model?

Q Yes.

MR. F. S. LYON: I hand you Defendants' Exhibit II. I think that is the one you want.

THE WITNESS: Yes, that is the one.

A (Continuing) The gas and oil were coming in from the side and would strike the outside of the pipe which is the gas outlet, and once we found that oil was coming over in the gas line along with the gas, and were some time in learning that as a matter of fact the sand in the oil was striking that pipe and had cut a hole in it so that some of the oil was going in here, the

(Testimony of Paul Paine.)

rest was coming down, and the gas was taking that out along with it. That was probably the greatest difficulty we had with the trap, and that was made by welding onto the outside of this gas pipe a piece of steel. Then there was occasional trouble with the float sticking.

Q BY MR. WESTALL: Do you know what range of movement is sufficient to operate those Klipfel valves?

A No, I do not.

Q It is a very slight movement, isn't it?

A Yes.

Q From fully open to fully closed?

A I don't know as to from fully open to fully closed, but I do know when a head of oil would come in and the oil level would go up a short distance it would open the valve sufficiently so that one could see the oil pass out through the oil outlet.

Q Did you ever have occasion to change the adjustment of any of the connections on the float arm of the Trumble traps?

A That was adjusted when the traps were set up in the first instance.

Q And no other adjustment was necessary after that time?

A I don't recall any. It could have been done, and possibly was done, on these traps, but I didn't know of it.

Q Now you refer to certain theories regarding the separating of the sand out of the oil. You don't know,

(Testimony of Paul Paine.)
as a matter of fact, from actual observation whether or not there is a more efficient separation of the sand with a deep level of oil in a trap—a better separation with a deep level than with a shallow level of oil in the trap?

A Is that a question or a statement?

Q That is a question.

A As I said before, it is conjectural on my part. I can't state definitely, no. As I said, I think they would just about compensate.

Q Now you have referred to the Lorraine reissue patent in suit and have described its mode of operation to the Court. Did you ever have an opportunity of examining the interior construction of one of the Lorraine separators made in accordance with that patent?

A I have seen the inside of the Lorraine separators, but further than that I don't understand your question.

MR. F. S. LYON: I think, your Honor, the records of this Court will show, and the briefs in the case of these defendants against the plaintiff will show, that the plaintiff in this case contends he never has built but one trap in accordance with this reissue patent, and that has been dismantled long ago; it was on the Tonner well that has been referred to.

MR. WESTALL: Read the question, please.

(Last question read).

Q Now I place before you Plaintiff's Exhibit No. 8. You have referred to that exhibit on your direct ex-

(Testimony of Paul Paine.)

amination and have compared it with the Lorraine patent. I want to ask you to please state if you find in that exhibit a receiving chamber for the reception of the oil and its constituents.

A I would consider the trap a receiving chamber, yes.

Q Do you find any separate compartment in which the oil is received and which could properly be called a receiving chamber?

A I haven't thought of it as such. Now this is a fine-hair differentiation of terms, and the best I can give to you is to say that I count that upper chamber of the trap as a passageway for the oil and gas in the course of which the gas becomes separated from the oil. I want to answer your questions but—

Q How would you define a chamber?

MR. F. S. LYON: Of course, your Honor, such cross-examination as the last couple of questions is totally without any bearing at all unless it is confined to definitions of the specification and claims of the reissue patent in suit and used to denominate the things having the purposes and functions and performing the functions in the manner therein set forth, and unless so limited it is valueless here. The mere question of a chamber is not material; it is a question of the kind of chamber performing a given function. That is the only thing that is comparable. I have not objected heretofore because I want to do everything I can to get through with this case; but if counsel wishes to get anything of any value here at all he should confine

(Testimony of Paul Paine.)
his questions to such a limitation that they have the same function and mode of operation as the particular part or portion that he refers to in the reissue patent in suit.

MR. WESTALL: Well, I cannot ask all the questions counsel refers to as functions all in one question. I intend to ask about those functions, though, and I merely ask him now to define a chamber as he understands the word.

A In my own mind, I consider a chamber as a container of something that is more or less quiescent, and differentiated from a passageway as something in which a substance is traveling. That is not a good definition, but I am not a good linguist.

Q A chamber might be a room that is perfectly quiet, or in which there was a great deal of noise, might it not?

A Yes.

Q So that the amount of noise or the degree of quietude in the place—

A Oh, no.

Q —whether something was quiescent or not, would not determine whether it was a chamber?

A But the hallway outside of the chamber, where people are passing to and fro, I would not call a chamber. I would call that a passageway or a hallway.

Q And yet a chamber might be an enclosed space with an opening on each side through which people might pass, might it not?

(Testimony of Paul Paine.)

A Yes, I presume so.

Q That would be a chamber?

A It might be most anything as far as my knowledge of the—

Q Well, now, would you consider that the part here marked "A" on the exhibit before you, Plaintiff's Exhibit No. 8, is not a chamber because it is open at the lower periphery of the cone and in communication with the chamber below?

A No,—

MR. F. S. LYON: Wait a minute. We object to that question as meaningless in this case and simply a waste of time. The only thing that can be of any value to aid the Court in construing this patent is to consider whether the chamber is such a chamber as the one with which it is to be likened or compared in the Lorraine patent, and unless it is confined to something of that kind the question has no probative value one way or the other.

THE COURT: He may answer as to whether he counts it a chamber at all in his opinion or view.

A I don't count it as a chamber at all. Really I don't.

Q BY MR. WESTALL: Well, it is a partially enclosed space in which the oil is received, is it not?

A Yes; and through which the oil passes.

Q Yes. Now comparing that chamber with the part in the Lorraine reissue patent, which is separated by the segmental partition No. 19, this segmental por-

(Testimony of Paul Paine.)
tion of the Lorraine patent is also a place or space into which the oil is received, is it not?

A Yes.

Q And through which the oil passes?

A Yes.

Q Now in referring to this Lorraine patent you have discussed the function of this vertical partition 19, and I believe you have stated that it did not perform the same functions as the top cone of the exhibit Plaintiff's Exhibit No. 8 before you. Is it not a fact that both of those members—the vertical partition 19 and the top cone—act to separate and prevent the oil from striking the float and interfering with its movement?

A No. I wouldn't say that you have given a correct designation of the difference there. The principal function of this plate or cone or umbrella-shaped affair marked—

Q I am not talking of the principal function; I am simply asking you whether or not both of these members do not have that similarity, that is, if they both do not perform that function, without regard to the importance or lack of importance of the function.

MR. F. S. LYON: I think the witness should have been permitted to finish his answer to the preceding question.

THE WITNESS: The question has become so involved that I do not understand it now.

MR. WESTALL: Well, read the original question.

(Previous question, and answer so far as given, read).

(Testimony of Paul Paine.)

A (Continuing) —marked "A".

THE WITNESS: You had spoken about the functions, and I was trying to answer that.

A (Continuing) —is to spread out the oil and separate the gas from it, and it may be that it performs an important function in preventing the oil from descending directly upon the float; although I would not count that as of great importance, in most wells.

Q BY MR. WESTALL: Do you mean to say that if there were no spreader cones in the top at all and the oil came in and dropped directly on top of the float, that in your opinion the apparatus would work properly?

A It all depends on the size of the well. I can conceive of wells so large in capacity that it would interfere with the float, and many wells small enough so that it would not make any difference.

Q So that the oil could drop directly on the float and not interfere with the action of the device?

A Oh, I think many wells don't make enough oil but what that wouldn't make any difference.

Q But there are a considerable number of wells in which the oil and gas come in with such force that if you did not have some cone or some baffle plate or other device to protect the float the float wouldn't have an opportunity to act the way it was intended?

A I conceive that is probable.

Q So that at least one function, regardless of its importance, of that cone in the top of the separator is to protect the float in those cases where the action of

(Testimony of Paul Paine.)
the oil might interfere with the action of the float; is that correct?

A I think so.

Q Now it is also true that Lorraine's arrangement with his vertical segmental partition acts in the same way and performs the same function of preventing the oil from striking the float and interfering with its action; isn't that so?

A Yes.

Q Do you find in the exhibit before you, Plaintiff's Exhibit A, a settling chamber?

A If that is the name of the body of the trap, I find it. There is one large chamber in the trap.

Q Assuming that the upper portion of the trap, above the upper cone, is a receiving chamber, would it not be proper to designate the lower portion of the receptacle as a settling chamber?

MR. F. S. LYON: That question is objected to as entirely hypothetical and contrary to the testimony of the witness, and as merely argumentative and not proper cross-examination.

MR. WESTALL: One of the functions of an expert witness is to answer hypothetical questions, your Honor.

MR. F. S. LYON: It is purely hypothetical as against the testimony of the witness and under a contrary state of facts.

THE COURT: He may answer.

A The bottom can be designated a settling chamber or a *a* sand-gathering chamber or an oil-passing-

(Testimony of Paul Paine.)

through chamber, or it can be given any designation.

Q By MR. WESTALL: Do you find in Plaintiff's Exhibit 8 a float mounted in the upper portion of the receptacle or trap for regulating the discharge of oil therefrom?

A It seems to be mounted about midway.

Q So that it would be in the upper portion of the receptacle, would it not?

A I say, it seems to be mounted midway.

Q You haven't made any measurements?

A No.

Q Do you find that the mounting of the float in the exhibit before you (Exhibit 8) is such as to permit a substantially uniform level of oil to be maintained in the settling chamber at a point above the vertical center of the receptacle?

A What do you mean by settling chamber?

Q I mean the part of the trap in which the sand settles; the lower portion of the receptacle.

A Now what do you mean?

(Question read).

A I don't know as to that. The position of the float, of course, would depend on the amount of oil the well is producing; upon the pressure of the gas contained within the trap; upon the gravity of the oil, and indirectly upon the viscosity of the oil; so that even with those all known I couldn't attempt to answer your question.

Q Do you remember whether or not on any of the wells—the thirteen or fourteen or fifteen wells you

(Testimony of Paul Paine.)
have referred to as equipped with Trumble traps—there were any weights or counterbalances on the float arm or any of its connections on the outside of the trap to counterbalance the weight of the float?

A I seem to recall something of that kind, but I am not positive about it. I couldn't say definitely that there were.

Q Did you ever estimate the level of the oil by observing the angle of the float arm outside of the trap?

A Oh, generally those levers were about horizontal.

Q Well, did you use that as a means or guide for determining the oil level, or did you always rely upon observation of the gage glass?

A For instance, in driving along the road past a trap, if those levers had been pointed up, indicating that the float had descended away down, we would have stopped, and to that extent those levers were observed where the gage glass was not observed.

Q Did you observe any instance in which the lever on the outside of the trap was in the position you have last indicated in your answer?

A I don't recall seeing them in that position.

Q Have you any idea how far one of those ball floats will submerge in the oil?

A No, I have not.

Q You don't know whether it would rest lightly on top of the oil three-fourths above the oil, or whether it would submerge in the oil, do you?

(Testimony of Paul Paine.)

A No, I do not. Of course if it filled with oil it would go right down to the bottom. That happened on one trap that I saw. That is, the float had a leak in it and the oil filled up the float ball and it went down.

Q Would it be possible to operate those traps with the floats submerged in oil when the level was, as you have indicated, an inch and a half from the top of the glass?

A Well, the best answer to that is that we did operate them.

Q You mean at the time the level was an inch and a half from the top of the glass the float was entirely submerged in the oil?

A No, I don't know how the float stood, how far it was in the oil. Do you mean totally submerged?

Q That is what I mean.

A Well, no, I don't know how far submerged the float was in the oil at the time the level of the oil was as stated.

Q Now suppose you take any one of those traps and have the oil level, as you have stated, an inch and a half from the top, would you say that the trap would operate successfully, if the float, under those conditions, were submerged underneath the oil?

A At the bottom of its—

Q Yes, when the level was as you have indicated.

A That question doesn't make sense to me. I am sorry. If you will make it clear to me I will try to answer you. Understand that you can't have that float

(Testimony of Paul Paine.)
partially submerged. If it fills with oil it is going to submerge clear down to the bottom.

Q Yes. Now we will assume that the level is an inch and a half from the top of the glass: where would the float be with relation to the top of the oil?

A It would be floating on the oil.

Q Now can you conceive of its being entirely submerged in the oil and the trap still operating?

A No.

Q Are you sure it was floating on top of the oil and not entirely submerged in the oil?

A I am not sure, but I can't conceive of it.

Q Well, what would be your preliminary observation or idea as to the operativeness of the device if it were said that this float was entirely submerged in oil at the normal level you have given?

A What is the question?

(Question read).

A And do you mean remain submerged?

Q Remain submerged during the entire operation.

A Then it would lose its usefulness, if it remained at the one position, because the whole principle of the trap operation is the flexibility and automatic action that results from this float going up and down.

Q Yes.

A Now if it remained submerged at the one position that feature would be lost.

Q Well, that is the idea I had in mind. Now if that float is submerged in oil—underneath the oil—it

(Testimony of Paul Paine.)

would not function, would it? If the oil raised higher it would be submerged and would not function, would it?

MR. F. S. LYON: Are you talking about a float that is leaky and has got oil in it, or one that is tight?

MR. WESTALL: No, I am talking of a float that is so adjusted that it is submerged in the oil.

A Well, does it stand still in the oil or go up and down?

Q BY MR. WESTALL: Well, what would it do if it had been submerged in the oil at the level you have indicated: would it be possible to have that trap operated with the float submerged in oil at the level under which you usually operated those traps?

A Theoretically, I think so, yes; because its degree of submergence—now, mind you, just on the theory of the case—its degree of submergence is going to continue the same, approximately, so that as the oil level goes up the float would go up. But of course that is all highly speculative.

Q And if the level goes down you think the float would still go down and maintain its relative position of submergence with regard to the top of the oil?

A I presume it would, but it is a difficult picture to conceive in my mind.

Q Well, you don't know, as a matter of fact, when the level was as you have indicated, whether the float rested on top of the oil or was completely submerged below the top of the oil?

(Testimony of Paul Paine.)

A Yes, because when we take hold of that lever and lift it it lifts quite readily, because it is coming up in the gas; whereas, when you move the lever the other way it moves with great difficulty, because you are pushing that float down into the oil and it meets with greater resistance.

Q Have you tested the lever arms outside of the trap in that way occasionally to determine the position of the float?

A Oh, many times. To determine the fact that the float was moving readily and not sticking.

Q. It is a fact that sometimes those floats do stick, is it not?

A Yes.

Q Did you ever observe a condition where the float was suspended above the oil and not operating on account of sticking?

A It would stick there for a little while and then drop down.

Q So that to observe the float arm as it stuck through the housing wouldn't be a very reliable guide as to the oil level, would it?

A A very good guide, yes, because these propositions of their sticking are very unusual.

Q I understood you to say you saw one of those traps you have been referring to on your direct examination a couple of weeks ago; did you not?

A I saw four.

Q Well, at that time you didn't take pains to observe the oil level, did you?

(Testimony of Paul Paine.)

A The glasses were not registering the oil level then.

Q Why?

A The gage cocks were closed.

Q You could have opened the gage cocks and observed the level, could you not?

A I could have, but I wouldn't do it. I was a visitor on the property.

Q So that you have no means of knowing what the level of the oil was in the traps at the time you observed them?

A At this time, no. There had been this discussion about whether this oil level was above or below the center of the trap, and I was in Bakersfield on business and I drove out there to satisfy myself.

Q Were you requested at the time you went out there to particularly observe those oil levels?

A No, I was not. I did it of my own volition. It had been a subject of discussion.

Q I wish you would mention as many of the wells and locations as you can upon which these thirteen or fifteen traps were located at the time you have referred to in your testimony.

A First, on Section 10 there was Well No. 3, and I think one or two more, the numbers of which I do not recall; on Section 6 there were—I think Well No. 2 and Well No. 5; on Section 8 there was Well No. 6; and—I can't recall definitely where the others were. They were scattered around on Sections 4, 6, 8, and 10 of the Honolulu Consolidated properties. I don't

(Testimony of Paul Paine.)

recall how many there were. And as a matter of fact they were changed from time to time, because sometimes a well would come in producing gas only and after a period of several months it would gradually begin to produce some oil and then a gas trap would be placed there.

Q Do you remember whether or not each and all of the traps that you have referred to on those fifteen wells, if that is the correct number,—

A No, as I say, I don't know that there were fifteen. There may have been only ten, or twelve, or eight. I don't remember how many there were.

Q But there were somewhere between eight and fifteen, you mean,—eight or ten or fifteen?

A Not over fifteen. But how many there were, as I have said, I do not remember.

Q Do you know whether they were all equipped with the same kind of Klipfel valves?

A So far as I recall they all had Klipfel valves.

Q Do you know whether they all had adjusting means on the outside of the traps, or were they the old style that didn't have any adjusting means on the outside of the trap?

MR. F. S. LYON: I object to the question as assuming and *and* stating a fact contrary to the evidence.

THE COURT: As to whether they all had adjusting means on them.

A Well, so far as I recall, they all had adjusting means.

(Testimony of Paul Paine.)

Q BY MR. WESTALL: You may be mistaken about that; you don't remember distinctly, do you?

A I don't recall any that did not have.

Q Well, do you remember distinctly some that did have?

A Yes, I can remember adjusting them.

Q You say you adjusted them yourself?

A I can remember seeing them adjusted.

Q Well, didn't you say a while ago that they didn't require any adjustment, that they were always adjusted when they were set up and remained that way?

A Well, they were adjusted at the time they were set up. Obviously, they must have required adjusting.

Q You don't know of your own knowledge from any actual experience that this high oil level in a trap is not an advantage in the separation of gas and oil and sand, do you?

MR. F. S. LYON: We object to the question as indefinite and uncertain unless it is pointed out to the witness what he means by "this high oil level".

Q BY MR. WESTALL: Well, referring to the Trumble patent in suit, which you have examined, you will see an oil level indicated in Fig. 2 of that patent.

MR. F. S. LYON: Do you mean the Lorraine reissue patent?

MR. WESTALL: No, the Trumble patent. Now in the Lorraine reissue patent you will see an oil level indicated in Fig. 4 of the patent.

Q Do you know from any test or actual experience as to whether or not the level shown in the Lorraine

(Testimony of Paul Paine.)

patent would be more or less efficient than the level shown in the Trumble patent?

A Just in so far as the traps prevent the oil from going over in the gas outlet and the gas going down through the oil outlet, I see no importance to the oil level. I consider that as far as efficiency is concerned in this respect there would be no difference in efficiency whether the oil level were carried high or low, just so long as it met the specifications which I have alluded to, and to that extent I think both traps are entirely sufficient. That is, they separate all the gas from all the oil, and that is all that is required of a trap.

Q But so far as the efficiency is concerned that is just simply your speculation; you don't know from any actual test of the two traps side by side?

A No, I know of no tests of that kind.

MR. WESTALL: I believe that is all.

REDIRECT EXAMINATION

BY MR. F. S. LYON:

Q Mr. Paine, you said this first Trumble trap was a source of great interest to you and the Honolulu Consolidated Oil Company officials, and one of, I believe, considerable moment in saving or production. Just what did you mean by that answer?

A Well, it enabled us to save the gas from the well and to save it under conditions of high pressure; and there were certain collateral benefits that resulted from it. The gas when it escapes from the oil at atmospheric pressure frequently does so in a white or bluish cloud, which means that that gas is carrying along with

(Testimony of Paul Paine.)

it vapors of gasoline. Such gas is collected and compressed and condensed and is the source of our so-called casing-head gasoline. Now by holding a pressure on the trap so that that gas was kept at a pressure of 75 pounds, or 175 pounds as in this case, it prevented the escape of those vapors, which remained in the oil; so that we found that our oil, after it passed through that trap, was two degrees Baume higher gravity than it had been before the installation of the trap.. That provided us, on the scale of prices in effect at that time, five cents per barrel more, which was $60 a day. We were also able to save a million cubic feet of gas per day, which had a value of $50, and we found, in actual fact, that we had an increased gas production from the well by virtue of this trap installation. Now that did not mean that the well made more fluid, but that these gas vapors which had been escaping into the air remained condensed in the oil, and that would amount to about 35 barrels a day. So that the actual cash benefit from the installation of this trap netted us at that time about $125 a day.

Q Then based upon your actual experience with these Trumble traps in 1915, 1916, and 1917, would you say that they were successful and efficient traps or otherwise?

A Oh, very, yes.

Q Very successful and very efficient?

A Yes. I won't say they were perfect, because they gave us troubles of one kind and another.

(Testimony of Paul Paine.)

Q Do you know when it was that the Richfield, Santa Fe Springs, Huntington Beach, Long Beach, and Signal Hill districts first came in in California?

A I can't definitely place Richfield, because it was some time before the time of my return to California in 1920. Huntington Beach was discovered in November, 1920; Signal Hill in June, 1921; Santa Fe Springs in October, 1921; Torrance and Redondo a short period thereafter.

Q Now have the wells of the fields mentioned required more or less gas traps than were required in California theretofore in handling the oil and gas from producing wells?

A The wells were distinctly of the high pressure flowing type. The oil was accompanied by a great deal of gas, in the case of Signal Hill probably the greatest proportion of gas ever encountered in the history of the industry, and there was therefore a great deal of gas. There was a further feature in that connection that grew out of the town lot developments, and that is the large number of new companies which started in connection with the development of Huntington Beach, Santa Fe Springs, and Signal Hill. The old line companies were in the habit of switching their gas traps around from one well to another. When a well stopped flowing that gas trap would be moved to a new well, so that they could be utilized over and over again, but with the big developments of these gusher pools in the southern part of the State and the inception of many, many new companies there was bound to be an in-

(Testimony of Thomas I. Sharp.)

creased occasion for the purchase of traps by concerns which had no equipment.

MR. F. S. LYON: That is all.

MR. WESTALL: That is all.

MR. F. S. LYON: Defendants rest.

THOMAS I. SHARP,

called as a witness on behalf of the Plaintiffs, in rebuttal, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESTALL:

Q Please state your name.

A Thomas I. Sharp.

Q Where do you reside?

A Long Beach, California.

Q What is your business?

A Oil field contractor.

Q What experience, if any, have you had with gas traps?

A Well, I have had the experience of setting them up—installing them rather—and maintaining them in operation.

Q How long a time has that experience extended over?

A Since 1909 for California; and 1907 for Oklahoma.

Q Where did you have that experience?

(Testimony of Thomas I. Sharp.)

A In Oklahoma in 1907 to 1909, on the Barnsdale lease and on the Gulf Oil Company's leases; and in California for the Union Oil Company and the Honolulu Consolidated Oil Company in the Midway field.

Q Are you familiar with the construction and mode of operation of the Trumble gas trap made by the defendants in this case?

A Yes, sir.

Q How long have you been familiar with that form of trap?

A Since about—in the latter part of 1914 or early part of 1915, I am not sure which.

Q What was your business or connection at the time you had your first experience with the Trumble trap in 1914 to 1915?

A What was my position with the Company?

Q Yes, what was your business or employment?

A Well, I was in charge of connection work. At the beginning of that time I was driving a truck.

Q For what company were you working?

A The Honolulu Consolidated Oil Company.

Q Did you ever observe the operation of this old Trumble trap?

A Yes, sir.

Q Please state just what you observed regarding the operation of that trap.

MR. F. S. LYON: We object to it on the ground it is incompetent, no foundation laid, the witness not having qualified to answer the question; and no identification.

(Testimony of Thomas I. Sharp.)

MR. WESTALL: Well, he has stated that he observed the operation of the traps and had experience with them.

THE COURT: What particular trap was that, as to the well? Did you give the number of the well?

A It was with the Honolulu Consolidated Oil Company, on the Honolulu lease, in the Midway field.

Q And the date?

A Well, beginning—I am not sure whether it was the latter part of 1914 or early in 1915 the first trap was installed.

Q It was the first trap?

A Yes, the first Trumble trap.

Q BY MR. WESTALL: What other experience after that did you have with these Trumble traps?

A Well, I have had experience with different size wells, giving us a little trouble in—

MR. F. S. LYON: We object on the ground that the witness is not answering the question; and on the further ground that the witness should be asked what he did in regard to the traps themselves, first. He says he was driving a truck, and so far as it now appears in the evidence he had nothing to do directly with the traps themselves. If he simply drove by them he can add no particular knowledge to this case.

THE COURT: You may describe whatever you observed—what you saw yourself about the trap and its operation.

A Well, at the time I observed these I speak of I was not driving a truck; I was working at lease work.

(Testimony of Thomas I. Sharp.)
I was used as a handyman, so they say, in taking different jobs as they would come up and relieving others; and in handling the connection work or installing of traps, boilers, or pumps on the lease, that dated back to about the first of 1915 and the period of my truck driving was up to about the first of 1915.

Q BY MR. WESTALL: How long did you have charge of the installing or connection of these Trumble traps?

A Well, not continually. From that time on until about 1916. As I say, it would be possibly two or three weeks of that time that I would be on other jobs; then I would be put back on this installation and maintaining of the traps and general lease work.

Q Now, where were these traps you have spoken of located?

A I don't know the location of the well of the first trap.

Q How many of the traps did you have an opportunity to observe during the time you have mentioned?

A Why, I don't know the exact number. All the company installed.

Q Could you approximate the number of them?

MR. F. S. LYON: We object to that if it is a mere guess. The witness is not qualified to answer.

THE COURT: Can you fix it by saying at least so many, or are you definite enough in your recollection? How many are you sure of, in other words?

A Well, I am sure there were six or eight at that time.

(Testimony of Thomas I. Sharp.)

Q BY MR. WESTALL: Can you describe in a general way what these Trumble traps looked like or what they were?

A Well, it was a receptacle for the receiving of oil that stood upright with a cone-shaped bottom and a valve attached on the outside for the handling of the oil; it was operated by a float; it discharged gas; with an oil glass on the side; an opening at the bottom to discharge the sand and water.

Q Did you ever look inside of the traps to see how they were made inside?

A Yes, sir, some of them.

Q And what can you say as to the interior construction of them?

A Well, they had a ball float with a lever—on the end of the lever, about, possibly, three feet—I don't just remember the length—or two and a half—and it had a cone-shaped or umbrella-shaped baffle at the top.

Q And what kind of valves did they have?

A The Klipfel balance valve I believe is what they call them; the two-seat valve; the Klipfel valve.

Q Did they have any means of adjusting on the outside of them—any connections with a float arm?

A No, the early Trumble trap didn't have an adjusting link. We made an adjusting link at the shop and put it on the arm later on.

Q You have spoken of the gage glass. Where was the gage glass?

A It was just above the seam or the line between the conical bottom and the straight side of the trap,

(Testimony of Thomas I. Sharp.)

possibly two or three inches above the rivets of the seam.

Q How long was the gage glass, if you know?

A I don't know the exact measurement.

Q Can you give the length approximately?

A I would say sixteen or eighteen inches.

Q Did you ever observe the operation of those traps?

A Yes, sir.

Q Did you ever notice what the oil level in the traps was?

A Yes, sir.

Q What did you observe as to the oil level in those traps?

A Well, the oil level would vary. It would depend on the well that they were installed for. The oil level would range from—possibly it would vary eight or ten inches. If it was a high heading well with low gas pressure it would probably range around ten inches of fluctuation—the oil level.

Q Well, I mean did you ever observe the glass to see how high in the glass this level was?

A Well, yes, I have.

Q And where, when you would look at the glass, did you see the level?

A Well, under normal conditions it would be about six or eight inches—about the center of the glass. Maybe an inch or so above the center. That is what we considered the normal.

Q What was the purpose of the glass, if you know?

(Testimony of Thomas I. Sharp.)

MR. F. S. LYON: We object to that as calling for a conclusion of the witness.

THE COURT: You may state what the use of it was.

A For determining fluid level.

Q BY MR. WESTALL: Was that glass long enough to take care of the various fluctuations of level?

MR. F. S. LYON: We object to that as leading and suggestive.

THE COURT: How long was the glass?

A I think possibly sixteen or eighteen inches. I am not sure of the length of the glass.

Q BY MR. WESTALL: And I am asking you whether it was long enough to enable you to observe the high fluctuations and the low fluctuations of the oil level.

A Well, not in all cases. In some cases the fluid would rise above the—

Q In those cases the oil would go over into the gas line, would it?

MR. F. S. LYON: We object on the ground that that is grossly leading and suggestive.

THE COURT: The question is leading, yes.

Q BY MR. WESTALL: Well, what would happen when the oil rose above the top of the gage glass?

A Well, it not at all times would be damaging at all. It would depend, of course, on how high it would go. You would not know how high it would go until it would go high enough to go over into the gas line, of course. That has happened many times with us, but

(Testimony of Thomas I. Sharp.)

it wouldn't happen every time it would go out of sight. It would depend largely on the pressure of the gas how high it would go.

Q Did you have any particular point on the gage glass which you considered at the normal level and at which you endeavored to maintain the level of oil?

A Yes; we tried to hold the level two and three inches below the top body; not more than three inches.

Q Below the top body?

A Yes; or below the gage glass valve, rather.

Q When the trap was operating normally where would the level be in the gage glass?

A With the original connections that came with the trap about not more than an inch above the center line, or the center of the glass.

Q The center of the glass?

A Yes.

Q Are you familiar with the Lorraine gas and oil separator manufactured by the plaintiff in this case?

A Yes, sir, I am.

Q What experience, if any, have you had with that trap?

A My experience covers installation and maintaining and operating the trap.

Q Do you know where the oil level is usually maintained in the Lorraine trap that you have seen?

A No, I don't know exactly.

Q Do you know whether or not there is any advantage in having a considerable volume of oil in a gas trap?

(Testimony of Thomas I. Sharp.)

MR. F. S. LYON: We object to that as not rebuttal. The plaintiff went into that question as a part of its case in chief and it is purely cumulative to go into that question with additional witnesses at the present time.

MR. WESTALL: I think not, Your Honor. The advantage of the oil level was mentioned at the beginning of the case, but it is not part of the prima facie case. The disadvantages, or the lack of advantage, have been the subject of an extensive amount of evidence on behalf of the defendants, and this is to rebut the constant suggestion that there was no advantage except as an oil seal. They constantly asserted by many witnesses that there was no advantage in the oil level except as a seal.

MR. F. S. LYON: That was the issue. You chose to open your case on it; you presented your testimony on it; we cross-examined the witnesses on it and we have called witnesses to rebut it. Now it is simply cumulative to attempt to bolster up your case and of course it is not rebuttal testimony.

MR. WESTALL: It is no part of the case, or a very small part of the case, to refer to certain advantages and certain features in the prima facie case. They are necessarily sometimes considered incidental. One of the defenses is that there is no particular advantage in the features or the combination of elements and that it does not involve invention because of a lack of advantage. That is one of the defenses set up. Now they have introduced a great deal of evidence

(Testimony of Thomas I. Sharp.)
here that there is no particular advantage in support of this argument of want of invention. It certain is rebuttal to show that there is a high order of invention in these particular features.

MR. F. S. LYON: If your Honor please, before ruling on that objection I would like to have your Honor bear in mind this, that plaintiff's counsel's argument would apply to any other fact in the case; it would apply to cumulative evidence on any part of his case. Your Honor has heard the testimony; your Honor has heard the testimony of the plaintiff's witnesses; your Honor has heard the cross-examination of them in regard to the advantages and disadvantages of their asserted invention. Now why can they put in their evidence on any one point of those assertions and then, not to rebut the case of ours, to simply bolster up and supplement their testimony in regard to a certain fact and call in rebuttal additional witnesses? This is not a fact for us to prove. Our testimony on that line was to disprove the assertions of their witnesses, and if cumulative testimony in regard to that class of fact is concerned where is the limit? We will be called upon to bring in more and more witnesses, and then we will get the same proposition again. It is not rebuttal even then, and then they can keep on forever. Under the rules of evidence, where a fact has been gone into by a party as a part of his case and his witnesses have been heard, then he cannot bring additional witnesses on that fact in rebuttal. This does not rebut any assertion of ours, but it is

(Testimony of Thomas I. Sharp.)

simply and solely an attempt to cumulate their evidence. In other words, this man's testimony is not to impeach or to show that one of our men who testified was incompetent to testify, that he was in error in any factor of his testimony, but it is simply and solely cumulative testimony.

THE COURT: Of course the proposition is who assumed the burden on that issue. If the burden was yours, then of course they could rebut it, but if the burden was theirs then of course this is not rebuttal.

MR. F. S. LYON: That is it exactly.

MR. WESTALL: If the Court please, in the prima facie case we rely, so far as advantage is concerned, upon our patent. We offered our patent in evidence and that is sufficient proof that we have made an invention, that it was a valuable invention, and that the patent is valid. You will find that they have pleaded that our invention was not a real invention; that the improvement didn't technically rise to the dignity of patentable invention. In opening our case there are many little incidental things in describing the various features where one will refer to advantages. If counsel had objected that it was not necessary on the prima facie case the Court might have possibly ruled it out. But in support of the issue that there is no invention in the combination they have offered evidence, witness after witness who have referred repeatedly to the lack of advantage of a high oil level. They have the burden, as your Honor said, of proving want of invention, because invention is to be presumed from the grant of

(Testimony of Thomas I. Sharp.)

the patent. Having that burden, they offer this evidence, and this evidence is purely to rebut their witnesses' testimony that there was no particular advantage.

MR. F. S. LYON: If your Honor please, the erroneous character of the argument may be illustrated in this wise, if your Honor is familiar with this issue in a patent case: Supposing here that we had a defense that Trumble was the prior inventor of exactly what is in this reissue, or that Tom Smith was, and that he invented it first, and supposing that the plaintiff as a part of its prima facie case goes in to prove when Mr. Lorraine got up and conceived and reduced to practice the invention. He takes the burden of that on himself in his prima facie case. Numerous cases have held that it is not rebuttal to put in additional, cumulative evidence to prove that date of invention. It is not a question in law whether or not it is necessary to assume certain proof at a time, but if a party voluntarily by anticipation takes the affirmative on an issue and puts his testimony in he cannot thereafter be allowed simply to put in cumulative evidence on that. That is our position in this case, and I think by the rules of law and evidence it is correct. They have put in their evidence on this and we have even dismissed our witnesses, some of them, from the jurisdiction of the Court. Now on the assertions of Mr. Lorraine's testimony and that of his witnesses, as to what the alleged advantages were, we have been fair on that proposition; we haven't concealed anything, and we

(Testimony of Thomas I. Sharp.)
most respectfully submit that the Court consider this question of whether this is strictly rebuttal and at some time or other stop this case, which is dragging along to unheard of lengths for a simple case like this. If the Court permits additional evidence on behalf of the plaintiff on what is and has been assumed to be its prima facie case—it controlled its prima facie case—then where is the Court to draw the line if we can bring in forty or fifty more witnesses on the same proposition? Is ours rebuttal of theirs? Where is the end, and what becomes of the question of rebuttal? Where is the line to be drawn? Isn't it that if a party assumes to prove a certain fact and produces witnesses to that fact, then he cannot, after he has closed that case and the other party has put in his witnesses, rebut that fact? Must not his rebuttal testimony go to the evidence of the witnesses, to impeach them, to show that they were not where they said they were or did not have an opportunity to observe, or something of that kind, and not be mere evidence which is purely cumulative and has no regard to what the other party's witnesses say, but would be just as competent and just as material as a part of the original, main showing on that issue? In other words, this witness's testimony on the elicited facts would be just as much competent in this case if he had been called as a part of the prima facie case as now. He is not rebutting anything that we said. He is affirmatively bolstering up, confirming and simply cumulating the evidence on a certain line. He is not going to testify, except as there is contradic-

(Testimony of Thomas I. Sharp.)
tion in testimony, in any sense in rebuttal. The question of rebuttal evidence, I submit, is not a question of merely is there a conflict of evidence. That is not rebuttal. The question of rebuttal evidence is something that our witnesses have said on an issue which has not theretofore been heard and the other side's evidence given.

MR. WESTALL: I think your Honor's first suggestion covers the whole case, namely, the question is upon whom is the burden. There isn't any difficulty in determining what should have been proven upon the prima facie case. If I had Walker on Patents here I could go through and show what is to be proven. The advantage of the patent is not one of the things to be proven by the plaintiff. That is presumed by the very grant of the patent.

THE COURT: It is almost adjourning time and I would like to examine the question a little. The question is now as to when we will go on with the case. I have a case set for tomorrow which might possibly be put over, and naturalization follows on Friday. Then on Wednesday, May 7, the two cases which were marked for three days then I understand are not to be tried. How are you situated as to that date, May 7, Wednesday? That would give us time to finish this case. If you went on tomorrow I would have to stop you on Friday.

MR. F. S. LYON: How much time, Mr. Westall, will you require for your rebuttal evidence? I think perhaps your Honor's ruling will make some differ-

(Testimony of Thomas I. Sharp.)

ence, because your Honor can see that same ruling is going to apply to a great many of these propositions.

MR. WESTALL: I don't think even if your Honor should rule against the evidence that it would materially shorten the case, because there isn't going to be very much evidence on that point. We could have had this evidence all in during the time we have argued, all that I want to get in. I think it will take maybe two days to get in the rebuttal. We have a considerable amount of rebuttal and probably we can finish it in two days.

THE COURT: The question is whether we shall go on with this case on next Wednesday.

MR. F. S. LYON: We have, as your Honor knows, a case set before Judge McCormick, I think it is the 6th of June, an equity patent case, which will take a considerable time to try. There are eastern counsel in it. By the way, that reminds me that I wish to call your attention to an amendment to the answer. That is the Trailmobile case, and you have under submission a question of—

THE COURT: No, I have nothing under submission in that case. Judge McCormick may have.

MR. F. S. LYON: I thought you had before you the question as to whether we should be required to answer further interrogatories.

THE COURT: I don't think I have. If I have I don't know it.

(Testimony of Thomas I. Sharp.)

MR. F. S. LYON: If it has been disposed of, all right, and if it is not there is an amended answer which still further removes any further necessity for answers. The only difficulty I have is the possibility of the defendant taking depositions in Seattle and Portland in that case at that time. I have no notice of them, but I should want to be free to make a motion for a continuance if such contingency should arise. In other words, so far as I know now, unless that matter intervenes, there is nothing to prevent my continuing on the 7th, 8th, and 9th.

MR. WESTALL: I would suggest if Mr. Lyon is to go away that Mr. Graham is here and Mr. Leonard Lyon is here.

MR. F. S. LYON: Mr. Leonard Lyon must leave for the East on some Standard Oil cases immediately and Mr. Richmond of my office is leaving for Texas. I think, your Honor, the 7th, 8th, and 9th will be all right. Let's see, that is a month from now, isn't it?

THE COURT: No, that is next week.

MR. F. S. LYON: Oh, yes, that will be all right.

MR. WESTALL: If that is not enough time—

MR. F. S. LYON: That will be satisfactory; but the following week, if we have to adjourn over, it might be difficult for me to proceed.

(A recess was thereupon taken to Wednesday, May 7, 1924, at ten o'clock a. m.).

(Testimony of Errol Ballanfonte.)

LOS ANGELES, CALIFORNIA, MONDAY, MAY 12, 1924. 2:30 P. M.

(Appearances as previously noted).

MR. WESTALL: If the Court please, we have a witness whose testimony will be quite short. May I interrupt the cross-examination of the present witness?

THE COURT: Yes.

ERROL BALLANFONTE,

called as a witness on behalf of the Plaintiffs in rebuttal, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESTALL:

Q Please state your name.

A Errol Ballanfonte.

Q Where do you reside?

A At Long Beach.

Q And what is your business?

A I am drilling oil wells, contracting and producing oil.

Q How long have you been engaged in such business?

A About thirty-five years.

Q Are you acquainted with David G. Lorraine?

A Yes.

Q The plaintiff in this suit?

A Yes.

Q How long have you known Mr. Lorraine?

(Testimony of Errol Ballanfonte.)

A Since, I think, July, 1917. I am sure it is July, 1917.

Q Did Mr. Lorraine ever explain to you any invention that he had in gas and oil separators?

A He showed me a drawing of an oil and gas separator.

Q Do you remember when he showed you any such drawing?

A In October, 1917.

Q How do you fix the date?

MR. F. S. LYON: We object to that as irrelevant and immaterial. It is more than two years prior to the application for the patent in suit, and would have no bearing upon any device that was in use at that time.

MR. WESTALL: It would show, your Honor, that the patentee invented the subject-matter at least two years prior to the date of application and before that time.

Q BY THE COURT: What date was it you fixed?

A October, 1917.

THE COURT: Objection overruled.

Q BY MR. WESTALL: Did he explain at that time the nature of this invention?

A Yes.

Q What did he explain with regard to the nature of the invention?

A Well, the method of separating the gas and oil and sand and water.

(Testimony of Errol Ballanfonte.)

MR. F. S. LYON: We object to that on the grounds it is not responsive to the question, and a mere conclusion, and move to strike it from the record.

THE COURT: You are asked for a detailed explanation of what he said to you. How did he describe what he had?

A Well, he showed me a drawing of a gas trap and explained the way it worked; and some of the features in it I didn't approve of, due to the fact that I had handled a lot of gas traps, and I had quite an argument with him about some of those points. The detail of his description, do you want that?

Q BY MR. WESTALL: Yes.

A He showed his floats inside; that he was carrying a fluid level above the center, in the upper part of the trap, which I didn't think was logical in view of the fact that all of the gas traps that I had handled heretofore or had seen operated had a very low fluid level. He explained his float and I had an argument in regard to that,—I mean the lever that worked the float; that I thought he would have trouble with his connection from the inside of the trap to the outside; and his cleaning features, how he could draw the sand and water off; and I think that is about all.

Q Why did you argue about the oil level? What objection did you have to that?

MR. F. S. LYON: We object to that as incompetent, irrelevant, and immaterial, unless it is shown that such discussion took place in the presence of some one

(Testimony of Errol Ballanfonte.)

of the defendants. We are proving what Mr. Lorraine did and not what this man objected to.

MR. WESTALL: It all goes to show the nature of the disclosure and the discussion that took place. It is a part of the discussion which took place, which shows the construction of this particular device.

MR. F. S. LYON: We are not bound by any objections that this man may have raised to whatever was shown to him.

MR. WESTALL: No, maybe not.

THE COURT: State specifically what you expect the witness to testify to.

MR. WESTALL: I am proving the date of the invention of the subject-matter of the Lorraine patent in suit, and this witness is testifying as to certain disclosures that were made.

THE COURT: I am speaking about the objection that he raised, how that is relevant.

MR. WESTALL: Any objection that he made is part of the discussion and throws a light, and shows the nature of the device. The fact that he objected to the high oil level, of course, would show that Mr. Lorraine explained to him the device and how the level was to be carried.

THE COURT: He may state anything that Mr. Lorraine said and all of the explanation, but I don't think the particular objections that he may have made, unless they are absolutely necessary to show the connection of the replies, are relevant.

(Testimony of Errol Ballanfonte.)

MR. WESTALL: They all go to show the conversation that took place.

Q BY THE COURT: Just tell what he said about the different parts of his device.

A His explanation for the high fluid level was that it gave it a chance to settle, more chance to settle; and he had some other explanations, why it would be better, but that was one of the things that I remember very distinctly. He said the fact that he carried a high fluid level would not cause the trap to fill up and go over through the gas line; that the float, or the maximum that kept the level at a certain point, would take care of that.

Q BY MR. WESTALL: Did he explain to you anything about how the oil came into the trap and the course of the oil when it came from the well into the trap?

A Why, the drawing showed that.

Q Is this the drawing that he showed you?

A Yes; either that or a similar drawing, or a copy of that.

Q Did he explain where the oil came into the chamber, when he showed you the drawing similar to that?

A Yes.

Q Where did he say the oil came in?

A In here.

Q You might indicate it by the letter "A", if you will.

(Witness marks on drawing).

(Testimony of Errol Ballanfonte.)

Q Now did he explain to you what the purpose was of the part that I mark with the letter "B"?

A Well, that it was a baffle, or rather a chamber, to carry the oil down so it wouldn't interfere with the float.

Q What, if any, explanation did he make with regard to the part that I have marked "C"?

A That was part of this system here carrying the oil down.

Q BY MR. F. S. LYON: When you say "here" you put your finger upon the baffle at the top of this drawing?

A Yes.

Q BY MR. WESTALL: For the purpose of protecting the float; is that it?

A Yes.

MR. F. S. LYON: We object to that as leading and suggestive.

Q BY THE COURT: What did he say about it?

A I have already—

Q BY MR. WESTALL: What did he say about the part?

A He said the oil came in—

Q BY THE COURT: Well, did he say anything about this partition there?

A Yes, he explained that the oil came in here and came down here (indicating), and came into the body here, and that this protected the float from the rush of oil.

(Testimony of Errol Ballanfonte.)

Q BY MR. WESTALL: Now you will notice fastened onto this some signatures. Well, you didn't sign that, did you?

A No. I say I don't know that this is the particular drawing; but it was very similar to this.

Q Did he ever show you any other drawing of a device?

A Yes.

Q When?

A I saw his drawings that he made in November of the same year.

Q 1917.

MR. WESTALL: We offer in evidence the drawing identified by the witness as Plaintiff's Exhibit No. 32.

MR. F. S. LYON: We object to the offer as incompetent, no foundation laid; and particularly in regard to the attendant writing on a separate piece of paper which has been handed the Clerk.

MR. WESTALL: The attendant writing will be explained by the witness.

THE COURT: It will not be considered as evidence. The paper will be marked only as illustrating the witness's testimony. He says it is only similar to what he saw.

MR. WESTALL: Yes.

Q Did Mr. Lorraine ever show you drawings like or similar to the drawing I now show you, referring to Plaintiff's Exhibit No. 4?

(Testimony of Errol Ballanfonte.)

MR. F. S. LYON: We object, your Honor, to that question. If this man has a recollection of the drawings he ought to be able to tell us what they were before the drawing is put before him, if the testimony is material at all. It is true that it goes to a certain extent to the weight of the evidence, but it destroys all opportunity of the Court or counsel to show whether the witness has any recollection.

THE COURT: You may show him the drawing and ask him when he first saw that.

MR. WESTALL: I am not trying to prove this identical drawing. He has spoken of other drawings that he saw, and I am asking him as to their general nature and character.

MR. F. S. LYON: Then we object to it as purely leading and incompetent, to ask him if it was like something he puts in his hand. The only competent testimony is for the witness to detail his recollection of it and not whether it is like something put in his hands.

Q BY MR. WESTALL: I will ask him, then, to explain in as much detail as possible any other drawings that were exhibited by the plaintiff Lorraine at any time after the time that he referred to in connection with Plaintiff's Exhibit No. 32.

A I saw a larger drawing in November, 1917, showing more detail of the drawing than you showed me.

Q. And what other details do you remember were shown in that drawing?

(Testimony of Errol Ballanfonte.)

A The float was in detail. I couldn't describe it, but I could probably make a rough sketch of it, and I don't know whether it would be anything like it looked to me or not.

Q In what respect was it different from the drawing that you have already identified?

MR. F. S. LYON: We object to that as incompetent. The witness should state what it was, not how it compared with something else. If he has a recollection that is of any probative value at all he can describe what is shown in this drawing, or else the evidence is valueless.

THE COURT: Can you describe the drawing you saw more particularly than you have?

A I don't know that I could. I can look at a drawing and tell what it is for and everything, but I don't know whether I could describe it so that it would be of any value, as I remember it.

Q BY MR. WESTALL: If you can state the subject-matter and the different parts that were illustrated in that, as well as you can, I think that would answer the purpose.

A Well, the detail of the float, and showing the location of it; the detail of the baffle—I presume you call it baffle—or chamber—that was protecting the float; the detail of the control that controlled the valves inside and out—the valve detail. It is a rather difficult matter to describe that.

Q Did Mr. Lorraine after that show you any other sketches or drawings that you recall?

(Testimony of Errol Ballanfonte.)

A Yes. He said he had made some new drawings, and brought them down to the office.

Q When was that?

A That was in December, 1917.

Q Can you describe, in a general way, what those drawings showed—what kind of drawings they were?

A Well, it was similar to the drawings that—the second drawing that I saw. I saw that on the drafting-board, and very similar—The drawings that he sent down or brought down were larger than the ones that he had on the board.

MR. F. S. LYON: We object to the answer as not responsive and as a conclusion of the witness and not a statement of fact, and ask that it be stricken out.

Q BY THE COURT: You say it was larger. Was it of the same appliance?

A Yes, just an enlarged drawing.

THE COURT: The motion is denied.

MR. F. S. LYON: Exception.

Q BY MR. WESTALL: Now, after December, 1917, did Mr. Lorraine ever show you any other drawings of this gas trap device?

A Not for some months. I don't recall when he showed them to me next. It must have been a year and a half or something like that before I saw another drawing.

MR WESTALL: That is all.

(Testimony of Errol Ballanfonte.)

CROSS EXAMINATION

BY MR. F. S. LYON:

Q In this explanation that Mr. Lorraine gave you how did he say that the oil would be kept from getting over into the gas line—by what means or mechanism?

A That his outlet would open up—the higher the float went the more the outlet would open up and let the oil out.

Q What did he say the float controlled?

A The fluid level.

Q Is that all?

A Yes.

Q What mechanism?

A It controlled both the oil and the gas outlets.

Q By what means?

A By levers.

Q In other words, that the float was connected above to a valve that controlled the oil outlet and the valve which controlled the gas outlet?

A Yes.

Q And was it not that automatic control of the valves of the oil and gas outlet that he was particularly talking to you about?

A Well, no, not in particular.

Q He did discuss those with you, did he?

A Yes; we discussed all points of it.

Q Now what did he have to say about that automatic control of the oil and gas outlets?

A Well, he said that he could carry his fluid level high enough—higher in the trap—that was his argu-

(Testimony of Thomas I. Sharp.)
ment to me—than it had ever been carried in a trap before, due to the fact that he could control this float.

Q In other words, because of the float controlling these two valves he could carry a higher oil level; is that what you mean to be understood as stating?

A Yes.

MR. F. S. LYON: That is all.

MR. WESTALL: That is all.

THOMAS I. SHARP,

recalled on behalf of Plaintiffs in rebuttal, testified as follows:

DIRECT EXAMINATION resumed

BY MR. WESTALL:

MR. F. S. LYON: I suppose, if your Honor please, we will take up the examination of this witness where we left off. There was at that time under consideration the question of an objection to the following question on page 866 of the record: "Q—Do you know whether or not there is any advantage in having a considerable volume of oil in the gas trap?" The objection which I made to that was that it was not rebuttal, and I wish to call your Honor's attention in that connection to certain authorities, and also to the condition of the pleadings, first; and I do this not because of the importance of this particular question but because it is evident that it is going to be one of the questions which will continuously arise on the closing of the plaintiff's case, and apparently an attempt to bolster up the opening case.

(Testimony of Thomas I. Sharp.)

The plaintiff alleges that Mr. Lorraine invented a new and useful improvement in oil and gas and water separators. Now one of those allegations is utility. The word is "useful". The answer denies each one of those alleged facts—either that it was new or that it was useful. I call your Honor's attention to that because it clearly appears thus from the pleadings that that is one of the affirmative allegations of the complaint which form a part of the plaintiff's case. Of course we know that in order for an invention to be patentable it must be useful and it must be new, or, in other words, novel, as defined by the patent law. And your Honor will remember that Mr. Lorraine was examined both on direct and on cross-examination as to what has been referred to here by his counsel as a high level and what has been referred to by Mr. Lorraine as a high level, and he has defined the purposes and his alleged utility of that. They went into that question on their case in chief, and we assert that, having gone into that question, and it being a part of their case in chief to prove utility, it is not rebuttal simply to call additional witnesses to show utility when utility has been denied by the defendants' witnesses.

Now the second step of that objection is that even if that were not true—which it is—but assuming that it is not; assuming that the plaintiff had then gone into that question by way of anticipating a defense and had opened up its case on that, then it could not thereafter call further witnesses simply to cumulate the evidence on that question.

(Testimony of Thomas I. Sharp.)

THE COURT: Preliminarily, then, does not the evidence present prima facie case of novelty and utility?

MR. F. S. LYON: Yes.

THE COURT: Now further than that, the fact that the plaintiff went into the question of the defect in the earlier Trumble traps, wasn't that for the purpose of establishing infringement?

MR. F. S. LYON: The fact that the plaintiff went into the defects of the earlier Trumble traps was for the purpose of proving utility, not infringement. The question of what difficulties they had with the earlier Trumble traps was material on the question of infringement. The question of infringement is, what are we using after the issuance of the patent in suit, and has nothing to do with what existed prior. But the plaintiff in this case actually went into the art of the prior Trumble traps for the purpose of bolstering up the prima facie presumption of utility of the patent, and thereby, under the evidence, to which we will advert in a moment, estopped himself from thereafter going into that; although as a matter of logic and as a matter of fact the plaintiff could stand on the prima facie presumption of utility from the grant of the patent and he did not need to put in evidence if he did not want to on that subject at all. That was a part of his case, however, and if he did not want to stand on the mere presumptive evidence from the issuance of the patent he had a right also to put in any corroborative testimony that he desired along that line,

(Testimony of Thomas I. Sharp.)

and he chose to corroborate that by the testimony of Mr. Lorraine, and he could have called at that time as many other witnesses as the situation in his opinion warranted. But after tendering the issue on that and closing his case, under all of the rules of regular procedure we insist that he ought not now, after our case has been heard and our witnesses partially have been excused, some of them absolutely, from presence within the jurisdiction of the Court, as the Court knows, plaintiff should not be allowed now to go in and attempt to bolster up that case by simple cumulation.

This evidence is not a denial of any new matter we have brought out; it is a part of the same cumulative question and within the rules it is not rebuttal.

Now to refer to only about four cases: I call your Honor's attention to what Jones on Evidence, in his third edition, Section 809, says:

> "In the regular way of procedure the party having the affirmative ought to introduce all the evidence necessary to support the substance of the issue; then the party denying the affirmative allegation should produce his proof, and finally the proof in rebuttal is received. Rebuttal evidence means not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove. Where the evidence is clearly rebuttal the one offering

(Testimony of Thomas I. Sharp.)

it is entitled to have it admitted and its exclusion is error. In the case of evidence which is strictly in rebuttal there is no right of reply to it unless it appears to be new matter, and then the court is justified in restricting the defendants solely to rebuttal evidence."

Again, Wigmore says, Section 1873:

"It is perfectly clear that the orderly presentation of each party's case would leave the proponent nothing to do, in his case in rebuttal, except to meet the new facts put in by the opponent in his case in reply. Everything relevant as a part of the case in chief would naturally have been already put in; and a rebuttal is necessary only because, on a plea in denial, new subordinate evidencial facts have been offered, or because, on an affirmative plea, its substantive facts have been put forward, or because, on any issue whatever, facts discrediting the proponent's witnesses have been offered. To discriminate between the first of these classes and the opponent's testimony merely denying the same facts that the proponent's witnesses had originally affirmed, is no doubt often difficult, and it is not then easy to say whether the proponent's testimony in rebuttal might or might not as well have been put in originally. Yet the principle involved is clear."

(Testimony of Thomas I. Sharp.)

In the case of York vs. Pease, 2 Gray (Mass) 282, which is the leading case on this subject, the Court says:

> "The plaintiff, in proving his prima facie case offered evidence to show that the words alleged to be slanderous were not spoken under circumstances which would bring them within the rule touching privileged communications. He was not bound to do this; but, in the exercise of his own discretion, he saw fit thus far to anticipate the defense. Having *this* opened this part of the case, and introduced as much evidence respecting it as he deemed expedient, he could not afterwards claim, as a matter of right, to accumulate testimony upon the same point. It was then a mere matter of discretion, with the judge who presided at the trial, to admit or reject the evidence, to the exercise of which no exception can be taken. As a general rule in the conduct of trials, if a party elects to proceed in the first instance with proof to anticipate the defense, he should not afterwards be allowed to offer evidence on the same point, in reply to the case made by the testimony of the defendant. To permit a party thus to divide his case leads to confusion and gives him an unfair advantage over his adversary."

In a recent case in the Court of Appeals of the District of Columbia, reported in 296 Fed. at page 285, we have a very nice illustration of the applicability of this rule, and I will say that the majority of the opin-

(Testimony of Thomas I. Sharp.)

ion reversed the lower court on the rejection of the alleged rebuttal evidence in the case. The minority opinion, however, agreed to the reversal on a slightly different theory, but the dispute between the Court, or the judges in that case, was upon this: whether it was a new fact which had been brought up by the plaintiff, or whether it was a fact which had been testified to in the plaintiff's main case. In order that the Court may follow what I have to say, that was a case of a motorcar accident; a truck was alleged to have struck I think a pedestrian in one of the Washington streets, and the allegation of the plaintiff in rebuttal was that the truck was on the wrong side of the street. A certain witness on behalf of the plaintiff in his opening case had testified that he saw the accident, and gave the circumstances of it. The defendant in its evidence contended that instead of where the plaintiff's witnesses testified the accident occurred it happened on the opposite side of the street and further down in the block. The plaintiff then called one of its original witnesses, and here is where the Court differed on the rule of rebuttal evidence that we have under consideration; the plaintiff then called one of its witnesses, recalling him for the purpose of rebuttal, to testify that from the position he was down here on the street he could see a certain distance over here; that he saw the accident; that he had made mathematical measurements, and that if the position had been as testified by the defendant's witnesses on this other side of the street it would have been without the range of his

(Testimony of Thomas I. Sharp.)
vision and impossible for him to see it because hid by obstructions, and so forth. The Court disagreed as to whether that was a new fact or not, the majority saying it was, and that the plaintiff's case was that the accident happened over at this point. The defendant brought in the proposition of the accident happening at this other point, and it was rebuttal to show that if it had happened at this defendant's point of view the plaintiff's witnesses could not have seen it and proved that to a mathematical certainty. All of the judges said that if it wasn't on that theory of denying the testimony of a new fact, that is, the accident happening at a different place, then the rejection would have been proper testimony. I want to call you Honor's attention to that case just to this extent; the majority of the opinion says:

> "It met something new which was brought out by the defendant and which could not have been anticipated by the plaintiff. It fell clearly within the rule governing the admission of rebuttal testimony."

Associate Justice Smith, concurring in the reversal but disagreeing on this one point, says:

> "Plaintiff's case rested on the proposition that the collision took place on the east side of Twentieth Street and the defendant's truck was on the wrong side of the street. Defendant's testimony tended to show that the collision took place on the west side of the street and that place was on the wrong side of the street. One of the witnesses,

(Testimony of Thomas I. Sharp.)

> who was on plaintiff's direct case, testified the accident occurred on the east side of Twentieth Street; was recalled to rebut the defendant's testimony tending to prove that the collision occurred on the west side of the street. By the witness so recalled plaintiff offered to prove that from the position which he occupied at the time he saw the collision he could see up Twentieth Street a distance of from thirty-six to forty feet above the north curb of E Street but could not see the point at which the defendant's witness said the collision took place. The testimony offered was in my opinion purely corroborative of that given on the direct case and was not proper rebuttal. The witness had already testified that the accident occurred on the east side of the street and the fact that he could not see the collision on the west side of the street served no other purpose than of repeating in another form the testimony he had already given."

The court there solely allowed that as rebuttal testimony on the ground that it was a new fact. Here in this case we have an attempt to introduce this rebuttal, and it is going through the whole line of this case I can see and that is why I make this argument for your Honor's consideration now. If the plaintiff is now allowed to ask each one of these witnesses what, if anything, there is in the line of benefit or utility or advantage in a high oil level and it is carried down through each one of the issues they have already testi-

(Testimony of Thomas I. Sharp.)
fied about, we certainly will have a right to open up our case in chief again just the same way, and then under the same kind of a ruling they would have a right to do it over again. The Court would lose entire control of the order of proof and it would be subject simply to the willingness of the parties to keep up this back-and-forth contention ad libitum, and we would never get through.

In this case the plaintiff himself has testified fully as to all of the alleged advantages of his alleged invention, of his so-called high level and everything else. He has covered those on direct and on cross. He has gone into all of the alleged difficulties of the early Trumble traps. If he wanted to corroborate that and wanted to pile up corroborating testimony he should have done that in his case in chief, and it is not proper for him now to put in testimony which is purely cumulative. The question that is now before the Court is germane solely to cumulative testimony. He could ask, "Do you know whether or not there is any advantage in having a considerable volume of oil in a gas trap?" and the witness could say yes, he knows whether it is or not, and then, "What is the advantage?" That is just pure cumulative testimony of Mr. Lorraine's testimony. We offset his testimony by the testimony of witnesses to show that the keeping of a proper oil seal, the necessary oil seal, was the only advantage to be had, and we put in such testimony in quantity and character as we thought was sufficient to do that. We could have put in a large amount more. Are we

(Testimony of Thomas I. Sharp.)
now to be called upon and to have a demand made upon us, as soon as they have closed their case and opportunity has gone for the collection of our witnesses, to further corroborate, by simply cumulative evidence, our case on that issue? And that is going to come the same way in regard to the prior difficulties that they allege with their Lorraine traps, and it is going to come again on another issue perhaps, and that is what sold on the Lorraine traps. We have already had Mr. Lorraine's direct testimony on that, and it is in the line of bolstering up the question of invention, because the Lorraine's traps went into use. It is an attempt now, perhaps, in rebuttal to show it was because of the so-called high level, but that is a part of their case in chief. And we say under this same rule that the plaintiff should not in the guise of rebuttal be permitted to cumulate his case.

MR. WESTALL: If the Court please, I notice in counsel's citation of authorities he found no patent case, and that there was no case in point, that is, applying to a patent case. In applying general rules there is always the danger of misapplying them. As your Honor remarked, this evidence, when it was originally brought in, was upon the question of infringement partially, that is to say, there were certain advantages we claimed, and we were showing we had these advantages and that the defendant used them. On that issue alone this evidence on rebuttal would be proper. Furthermore, we should remember that in a

(Testimony of Thomas I. Sharp.)

patent case it is elementary that although you allege that the patentee invented a new and useful improvement, following the words of the statute, you prove that prima facie by the introduction of the letters patent themselves. They carry the presumption that the subject-matter is useful; they carry the presumption that it was novel. Counsel might with just as much reason argue that because we introduced the patent in evidence—and there is no distinction between a presumption as evidence and the testimony of a witness—it is all evidence to prove a fact—we were foreclosed upon rebuttal to show that it was novel, to contradict the testimony on behalf of the defendant in trying to prove that it was not novel. There is just as much reason in one case as in the other. Your Honor will remember that there was a great deal of testimony on behalf of the defendants that the old Trumble traps were efficient. We contend and we shall show that those Trumble traps were all low level traps, such as is shown in the patent to Trumble. The question of the efficiency of those traps is involved. We did not offer in evidence on our prima facie case anything to prove the inefficiency of the old Trumble traps.

THE COURT: Yes; Mr. Lorraine testified to that, something about that.

MR. WESTALL: Perhaps to a certain extent.

THE COURT: I suppose that that proof was offered for the purpose of pointing to the features which you claimed amounted to infringement; that it went to that point in order to illustrate it and point it out.

(Testimony of Thomas I. Sharp.)

You didn't claim that the whole apparatus was an infringement; you claimed that there were certain features developed and that that was one of them, and I thought that proof was all directed to that point, to point out the infringing features, or alleged infringing features. Mr. Lorraine did testify on that.

MR. WESTALL: Possibly there was some reference in there to describing the character of the invention.

THE COURT: My brief says: "I observed low level traps in the fields, the first the Trumble people built. Low oil level would unseal the gas and allow the gas to escape. The valve would be cut out. I know quite a few low level traps did not operate the well; failed to work on one well I saw. I replaced quite a few Trumbles with mine. In May, 1921, I showed Rae drawings", and so forth.

MR. WESTALL: On the question of efficiency, of how these traps operated, there has been a great deal of evidence relating to specific traps, in which they say that they were just as efficient, and those very traps we expect to show operated with the low oil level, as we contended in rebuttal. In addition to your Honor's suggestion we think it is also admissible as to the effiiciency. We are not contending that those old traps di*w* not operate, but we are contending that they were not as advantageous and not as efficient. And so that is another ground for taking the evidence of witnesses, as to the advantages of these particular

(Testimony of Thomas I. Sharp.)

features which made them more efficient. This question will lead on to other comparisons as to the efficiency of those very traps that have been referred to by Paul Paine and by Mr. Morgan. It seems to me, though, that if you say that because we offered any evidence at all upon any of these issues in our prima facie case that therefore we shall be foreclosed from rebuttal, why, you must logically say—

THE COURT: I don't think that should be said unless that was necessary proof on your part at that time. If it was necessary in making out your case, of course then it is your original case and not rebuttal.

MR. WESTALL: That seems to dispose, as I understand it, of the question, because we did not put any evidence in to prove any facts that would require it. We could have put in the patent and rested and any slight amount of evidence upon these various points was merely for the purpose of illustrating, as your Honor has suggested, or making clear, what we contended to be infringement and in proving infringement, as well as upon the efficiency of the traps.

MR. F. S. LYON: So that the Court may not have any misapprehension, counsel says that they could have stood upon their prima facie case with the patent and not put in any evidence as to utility. I agree with him. But that does not answer the question that is before the Court. He didn't have to put in any affirmative proof; he could have stood on the presumption of law. We could have stood upon our evidence rebutting that presumption. But whether he

(Testimony of Thomas I. Sharp.)
then to be allowed to bring in testimony in alleged rebuttal which is merely cumulative of that presumption is another question, and that is what he did.

THE COURT: Suppose he had not introduced any evidence beyond, as you say, introducing his patent, and you had come along with this evidence showing many specific cases of installation of Trumble traps and the manner in which they worked, and that that work was satisfactory under all conditions. Now, isn't he entitled to rebut that testimony, if he can rebut it, by contradicting it?

MR. F. S. LYON: In regard to specific instances, yes. I am not, however, addressing myself to that subject-matter now. I am addressing myself at the present time, your Honor, or interrupting my previous statement, I can conceive that some of the evidence he has referred to may be rebuttal, but this question of whether there is invention or utility in a high level is not one of those factors, nor are some of these other things that we have been referring to. I will say under this Court of Appeals decision that I read it may be proper rebuttal testimony if he will bring specific testimony, for instance, to say that the trap on Chapman No. 1 that we have referred to didn't work the way our witnesses say it did. I am using that as an illustration. But the general questions of utility, the question of invention, and those things which are part of his main case, cannot be covered by his witnesses in rebuttal.

(Testimony of Thomas I. Sharp.)

THE COURT: That Court of Appeals case was on a very narrow line, and the only possible new thing they had there was the fact that the defendant placed the accident in a position where the plaintiff's witnesses could not have seen it. The only fact there was the intervening obstruction, and without that there would be absolutely no ground to call it rebuttal testimony.

MR. F. S. LYON: I took it as an extreme case but illustrative of this point, and I will give you a patent case if you wish it. In the case of Swinglehurst vs. Ballard, 258 Fed. 973, the proposition was ruled on that a party cannot under the guise of rebuttal put in cumulative evidence which merely goes to sustain and support that which was introduced to sustain his original case nor evidence on an essential point which he failed to prove in his original case. The text book that I am reading from also cites the California Supreme Court decision of Kohler vs. Wells Fargo & Co., 26 Cal. 606, at page 613.

In the patent case the issue that was presented by the party against whom the ruling that the testimony was in rebuttal was made was as to whether A or B was the inventor of a given invention. A contended that B received the invention as a communication from him; in other words, that it was a stolen invention, and that was part of his allegation. He put on testimony tending so to prove, or attempting so to prove. In rebuttal, after the other man's testimony had been put in, he wanted to put in additional testi-

(Testimony of Thomas I. Sharp.)
mony to show derivation directly from a third party who had his derivation from A. In that case whether B got the invention from A or not was only material inosmuch as it would show that B was not an original inventor. A invented it anyway, and it was only defensive matter as to A if B got the invention from him. In other words, you can readily see A's contention that he was the original inventor was not entirely to be judged by the presence or absence of that fact. The Court in that case said that having gone in at all into that issue when it was not necessary for him even to have gone into it as a part of his case, he could not then turn around and cumulate his evidence on that issue for the purposes of the case, because if he went into it in the beginning he must go into it fully; that there must be order in the trial, so that the party would know what testimony he had to meet, the same as we are seeking here. My remarks do not go, I will say frankly, to the case that Mr. Westall is referring to. For instance, we have referred to the Chapman No. 1 trap, If they want to deny our evidence as to how that particular trap worked, very well; but it wouldn't be competent for them to go out and say that here are fifty Trumble traps out here that our evidence hasn't touched at all, which only cumulates Lorraine's original assertions on the stand as to which we have offered no testimony whatever. We are standing on certain specific traps so far as our evidence is concerned. If they rebut anything they must rebut the new facts in regard to those traps we

(Testimony of Thomas I. Sharp.)

have brought out; otherwise we will never get to an end of this trial, and we will never get to the end of the testimony, if we can bring in every man in Southern California on one side or the other and ask him whether or not there is an advantage in a high or a low oil level. That is the difficulty that we have confronting us.

THE COURT: I agree with you, in the main. I shall sustain the objection to any general evidence tending to show the advantages of a high oil level; also to the showing of how Trumble traps operated other than those referred to in the testimony offered by the defendants. You may have an exception shown.

MR. WESTALL: Note an exception.

THE COURT: You may meet any of the testimony that goes to the contradiction of those specific instances. They have picked out certain traps and said those worked in such a manner. Now if there is anything to contradict that it may be offered.

MR. WESTALL: I have this in mind, your Honor: Certainly counsel does not contend, does he, that in putting in his case he is taking the position that there was no utility in our high oil level? As I understood him to say a few minutes ago, he didn't put in any evidence, and didn't understand that there was any evidence in the record, contending that there wasn't an advantage in our high oil level. If he takes that position, and if that is his position, of course there is not anything to rebut. If, on the other hand, he says his testimony proves, and he attempts to prove,

(Testimony of Thomas I. Sharp.)

that there was no advantage in the high oil level, surely we ought to have an opportunity to rebut that testimony.

MR. F. S. LYON: You have heard the testimony, Mr. Westall, and I haven't made the statements that you have attempted to put in my mouth. My statement was that we had rebutted Mr. Lorraine's statement of his alleged advantages of a high oil level.

THE COURT: I don't think either of you disagree upon the proposition that a very high oil level is an advantage because of the likelihood of it dropping below the oil outlet, due to various conditions, wearing the valves and allowing the gas to blow out.

MR. F. S. LYON: But that there is any other advantage I think there is a dispute in the testimony.

MR. WESTALL: We contend that there are a great many other advantages. They attempted to show in their testimony that the only advantage was that it was just to maintain a seal. That is a fact that we want to rebut. Again and again witnesses testified that the only advantage was the maintenance of the seal, and we want to show that there were other very important advantages.

THE COURT: I think the witnesses for the defense have testified that it was advisable to keep the oil as high as it could be kept without being so high that it would go out the gas outlet on one side, in other words, the advantageous position is about the middle of the cylinder somewhere.

(Testimony of Thomas I. Sharp.)

MR. WESTALL: Yes; but there was a constant repetition by counsel and the witnesses that the only advantage was the advantage in maintaining that oil seal. That is a position which we did not know they would take when we introduced our prima facie case. This evidence is in rebuttal of that, to show that that is not the only advantage, that there were other advantages, and important advantages, other than maintaining that seal.

THE COURT: Just state what they are. I don't understand what you mean.

MR. WESTALL: The high oil levels enable the sand to separate out to better advantage, and the greater volume in the trap allows a longer time for settling. Furthermore, a large volume of oil in the trap has the tendency to keep down the foam, and it absorbs the formation upon the surface. Those are all important advantages, and so important that when these traps were first placed on the market, when Mr. Lorraine first tried to introduce them, he had no success and he couldn't get anybody to buy them because they were afraid of that high oil level. Now that he has finally convinced them of the advantages you cannot sell anything else but the high oil level out in the field. That was the importance of those things. That might seem not a very important thing but the efficiencies of these traps is the big thing in the separator.

THE COURT: He testified, didn't he, in the main, to those things which you have now related? He

(Testimony of Thomas I. Sharp.)

testified that he was some two years getting one to be tried at all, or in use.

MR. WESTALL: Yes.

MR. F. S. LYON: Those are the alleged advantages, your Honor, and we put in our testimony to rebut those statements of evidence.

MR. WESTALL: You didn't rebut that he was two years trying to get his trap on the market. The rebuttal that we offer is to show that these advantages which they selected and constantly repeated and said were the only advantages were not the only advantages; that there were other important advantages which they would like to disregard and those advantages go right to the very substance of the case. Those advantages are things that this high oil level trap produced, which were not produced by the old traps, and the evidence is material upon the question of invention, upon the question of showing what they appropriated of the advantages, and upon the question of showing utility,—utility, infringement, and invention, showing that it required inventive skill in view of the fact that these plain advantages were not known at that time to produce these things. They attacked us in their testimony upon the question of infringement, of utility, and of invention, and this testimony surely should be admissible upon those points, and we submit that unless we have the testimony in that we are at a very great disadvantage, because we have not a full opportunity to rebut the testimony that they spent a

(Testimony of Thomas I. Sharp.)
great deal of time putting in, a constant repetition as to supposed advantages which are not the real advantages. If we had known that they were going to take any position like that, that such and such a thing was the only advantage in the trap, then we would have been in a position on the prima facie case, if the Court thought desirable, to put in more testimony upon that point; but we didn't know that until their evidence went in, and now we come in to rebut it.

MR. F. S. LYON: If your Honor please, permit me to correct what may be a misapprehension as to the state of the record. We do not concede that a mere high oil level has anything to do with the operation of the trap. It is all relative to the question of where your oil outlet is. If your oil outlet is low in the trap, then your level may be low; but if your oil outlet is raised higher then you must carry a higher level in your trap in order to maintain the seal. Now I want to answer in probably two sentences counsel's last remark. First, this case has been tried once before. There is not a new issue in it. There is some additional evidence but not a new issue. We have been endeavoring through two trials to find out what this wonderful invention of a high oil level is. We have never had a definition of that succinctly yet. Here is a case where the plaintiff himself, as well as his counsel, has deliberately opened up as a part of their case in chief—and necessarily so, if they want any evidence under it—the question of what utility what they refer to as a high oil level has. We have

put in our testimony to deny that there was any utility whatever except to have sufficient oil to perform the necessary sealing effect, having due regard to where the outlet was. That is purely and solely testimony of denial. It is not a new fact at all. We haven't asserted a new operation, and to allow any evidence in regard to the alleged utility of the invention or novelty is simply to allow as rebuttal a part of their case in chief. I don't think I need to argue that further because plaintiff's counsel's ideas are so twisted on this proposition of what is his case that I don't think it is necessary. He might, as we have done in many patent cases, have simply made out a case by proving his title, introducing his patent and proving what the plaintiff was doing. He doesn't have to go any further than that, but he may do that. When you come to the question of rebutting that evidence it is just exactly as Jones says: "Evidence in denial of some affirmative fact which the answering party has endeavored to prove." The question of this oil level, except whether or not it existed in certain prior Trumble traps, is not affirmative evidence in any manner. That is the only affirmative evidence that we have, and as to that I say he has a right to rebut that specific evidence.

MR. WESTALL: It seems to me under counsel's own statement it is clear that we are rebutting a fact that they first brought out in their testimony, namely, the fact that with this oil level unless it was maintained high there would be a breaking of the seal.

(Testimony of Thomas I. Sharp.)

They said the only advantage was the breaking of the seal. Our rebuttal showed that that was not the only advantage. We are answering directly that evidence of theirs that that was the only advantage, and we say that there are other important and vital advantages which they have overlooked. Certainly that is rebuttal. I don't see how the Court could consider it in any other way.

THE COURT: As to its superiority as a settling chamber is one thing. You claim the greater depth of the oil facilitates the settling of debris, so to speak, that is in it, which is one thing.

MR. WESTALL: That is one thing.

THE COURT: And, second, what else?

MR. WESTALL: Second, that there is a time element by reason of a larger volume of oil, and the oil that is in there has a longer period of time in which to settle. It flows in at a certain rate and flows out at a certain rate.

THE COURT: As to the matter of sealing, there is no question. On those two matters you have now suggested I will allow you to introduce evidence, the advantage for the purpose of settling, and because of the depth. And the added time you say?

MR. WESTALL: Yes. And of course also the absorption of the froth and foam. That is another point.

THE COURT: Very well; those three propositions.

MR. F. S. LYON: Note an exception.

(Testimony of Thomas I. Sharp.)

THE COURT: Let the exception be noted.

Q BY MR. WESTALL: The question was do you know whether or not there is any advantage in having a considerable volume of oil in the gas trap.

THE COURT: Make your questions pointed, even though they are leading. Direct them to the specific thing and get at that.

Q BY MR. WESTALL: I will say, then, what other advantage besides maintaining the oil seal at the valve is there in having an oil level high?

MR. F. S. LYON: We object to that.

MR. WESTALL: That has already been admitted, that that is the advantage.

MR. F. S. LYON: That isn't the Court's ruling.

Q BY THE COURT: You have heard this discussion as to whether there is any advantage by reason of the high oil level in the way of settling facilities.

A Yes, sir; I consider it a great advantage.

Q What is it?

A It gives a larger volume of oil, to allow that admitted to rest within that volume, and allowing the sand more time to settle before drawing it on through the discharge. Do you want me to answer that in full?

Q A settling advantage, and something was said about the froth that is there, as to its effect on that.

A Well, we find that there is a body of froth on top of the oil, and this main body of solid fluid resting too low would allow the froth or the gas to blow through the gas line, or oil line, I should say.

(Testimony of Thomas I. Sharp.)

Q BY MR. WESTALL: You were testifying concerning certain traps in use by the Honolulu Consolidated Oil Company near Taft. How long a time did you have an opportunity of observing the oil level maintained in those traps?

A Why, from the beginning of the time they came on the lease, the time they began using traps, in other words, on that particular lease.

Q Do you remember about when that was?

A I don't remember the first trap, which was, I believe, a McLaughlin. The first Trumble and first Lorraine I remember.

Q When was this first Trumble trap installed?

A In the latter part of 1914 or early 1915, but I couldn't tell you which as I am not sure of the dates.

Q After that there were other Trumble traps installed there were there not?

A Yes, sir.

Q Do you know how many all together?

A No, I don't know the exact number.

Q Taking that first Trumble trap that you have referred to, did you observe the oil level in that trap as it was maintained when the trap was first put in operation ?

A Yes, sir.

Q What oil level was maintained in the trap, to your knowledge, when it was put in operation?

MR. F. S. LYON: I would like to ask the witness what well that trap was on.

(Testimony of Thomas I. Sharp.)

A That was on Well No. 3 on Section 10 of the Honolulu Oil Company.

Q BY MR. WESTALL: Can you answer the question?

A What was the question, please.

(Previous question read).

A Well, the level was high, considered high, as it was about the center of the glass, until after the well was settled, in a settled state, possibly two or three weeks. We held the level high for two or three weeks, or until the well was in a settled state, at the flush of production.

Q. What, if any difficulty did you have in operating the trap when it was first put in operation with the level as you have described?

A With that level?

Q Yes.

A Well, we had no difficulty in the operation of the trap at all.

Q What difficulty did you have?

MR. F. S. LYON: The witness hasn't testified to any difficulty.

A We had no difficulty with the trap, but we couldn't save the gas. It would pull the foam over at that level. We would have a wet gas and we didn't cut it into the line.

Q BY MR. WESTALL: Do you mean it would not make an efficient separation of the gas and the oil?

MR. F. S. LYON: We object to that on the ground it is leading and suggestive.

(Testimony of Thomas I. Sharp.)

Q BY THE COURT: Just what do you mean by that?

A I mean that we found there was foam on top of the main body of oil, and that this foam holding it that high would evidently pull over into the gas line in the gas blowing out. There was lots of gas in this particular well.

Q Was that because the level was too high?

A Yes.

Q BY MR. WESTALL: What, if anything, did you do to remedy that condition?

A Well, we lowered the level.

Q How low did you operate after that? How low was the oil during the normal operation after that experience?

A Well, the normal level on the settled well was always around two or three inches above the bottom of the glass, and this was no different from any other well or trap. We carry them all at that level, about three inches above the bottom of the glass.

Q Do you mean all of the wells out there on the Honolulu property?

A Yes, on all of those traps we carried it about three inches above the bottom of the glass.

Q During the early operation of the trap did you have any other device than that gas trap on either the gas line or the oil line to aid in the separation of the gas and oil or sand?

A Yes, sir.

Q Please describe what devices you had.

(Testimony of Thomas I. Sharp.)

A We had a small tank on the oil line that would settle the sand out as it would go through the trap before going on into the shipping tank. We discharged all of the oil from those traps into a small 50-barrel tank for the settling of the sand before shipping it on, otherwise the sand would fill the lines and we would have to take up the lines or get into the shipping tank, which was rather difficult to clean out.

Q So that you found that this Trumble trap did not efficiently separate the sand from the oil during that early operation, is that correct?

A Yes, sir.

MR. F. S. LYON: We object to that as leading and suggestive.

MR WESTALL: I think he has already said that.

MR. F. S. LYON: Then if he has it is a mere repetition.

THE COURT: I will let it stand. Overruled.

MR. WESTALL: Just answer the question.

THE COURT: He has answered it.

A. Yes.

MR. F. S. LYON: Exception.

Q BY MR. WESTALL: You spoke of other devices on the gas line. What was the character of those devices and what were they used for?

A They were used for taking care of the oil that would pull over into the gas line, to prevent it from being carried onto our compressors if it was on the gathering line. If it was on the fuel line it would

(Testimony of Thomas I. Sharp.)
be for the same purpose, of course, to collect this oil that would be pulled over into the gas line.

Q What was the nature of the device that was used for that purpose?

A We made it from pipe and attached it in the line. It was constructed so that this oil would fall down to this lower pipe or leg of the line and could be bled out or dripped out into a little tank to save it.

Q Why did you have those devices on the oil line and the gas line of that early Trumble trap?

A Why?

Q Yes; why did you have them?

A Well, we were conserving the gas and the trap in the gas line was to take care of the oil that went through, to keep it from going on through into the compressor.

Q In other words, the separator did not take all the oil out of the gas; is that correct?

A Yes, sir.

MR. F. S. LYON: We object on the ground that is grossly leading and suggestive, your Honor.

THE COURT: The question is leading. He may state the purpose of it. But your question was leading.

Q BY MR WESTALL: Then will you state the purpose of the device on the gas line with regard to the separation of the oil and gas?

A Well, I can't state other than I have. It was just for the purpose of collecting this oil that would go over to the gas line when the oil level happened

(Testimony of Thomas I. Sharp.)

to go too high in the trap; for taking it out of the gas line.

Q Now after your experience with that first trap do you remember when they put the next gas trap on the Honolulu property?

A No, sir, I don't know the exact date nor possibly within four or five months of it.

Q Did you have a chance of observing the operation of that second trap?

A Yes, I had the opportunity of observing the operation and of the action of all the traps there.

Q Was there any difference in operation, of those later traps, from what you have described with reference to the first trap?

A No.

MR. F. S. LYON: We object to that as leading and suggestive.

THE COURT: Well, he says no.

Q BY THE COURT: When you say later, up to what time do you mean? When was the last time that you know anything about the operation of it?

A Up to November 15, 1922.

Q Did they continue to use these auxiliary appliances for the separation of the sand and also of the oil? and gas?

A So long as we got sand from that well.

Q You always used them from the first on?

A Yes.

Q As long as you had any experience with them?

(Testimony of Thomas I. Sharp.)

A As long as that particular well made sand. Of course, when the well discontinued making sand we would not need that appliance.

Q But ordinarily, when a well first came in, you would always use it?

A Yes.

Q How long did those wells produce sand?

A Well, they produced sand for a number of years; in fact they make sand yet.

Q You considered the appliance necessary whenever there was sand?

A Yes.

Q Did you have a drip—

A We usually put a little drip right at a trap, and then along the line.

Q And you have always used it?

A Yes, sir.

Q BY MR WESTALL: Now I call your attention to Defendant's Exhibits A-5, A-6, and A-7 and ask you if you have ever seen the traps illustrated in those exhibits (handing same to witness).

A I will say they look very familiar, but I couldn't say that those are the traps I saw. They have the marks there, of course.

Q That is, aside from the marks on the paper you would not recognize the traps from the photographs?

A No, I would not.

Q That is, if it were not for the marks on the exhibits?

A No.

(Testimony of Thomas I. Sharp.)

Q Do you know of Well No. 48, Section 6, of the Honolulu Consolidated Oil Company?

A Now that was a new numbering system they had. I am not sure, but I think I recognize that as being old Section 6, Well No. 7. I am not sure that that is the number.

Q Here is the description (showing paper).

A Yes; but that number would have been changed, or was changed, when they renumbered all the sections. But I think that was Well No. 7.

Q They renumbered all the wells, the Honolulu Company, after you left; is that correct?

A Yes. Is that Section 10? No, not after I left, but before I left.

Q Now, were you familiar with all the gas traps that were operated by the Honolulu Consolidated Oil Company at the time you were connected with the company?

A All of them; yes, sir.

Q All the Trumble traps?

A Yes, sir.

MR. WESTALL: I believe that is all.

CROSS EXAMINATION

BY MR F. S. LYON:

Q Again, where was this first Trumble trap on the Honolulu property—on what well?

A The first trap bought, on Well No. 3, Section 10.

Q What was the number of that well?

A No. 3.

(Testimony of Thomas I. Sharp.)

Q When did you say that Trumble trap was placed on that well?

A Why, I think it was in 1915. I am not sure. Either 1914 or 1915.

Q Well, which was it, 1914 or 1915?

A I couldn't say.

Q Did you help install it on that well?

A Yes.

Q At what time in 1914 or 1915 was it put on that well?

A I couldn't tell you.

Q You don't know whether it was in the spring or in the summer or fall or winter?

A No, but I think it was in the spring. I don't like to say, because I might be mistaken, but I think it was early—

Q You are unable to state whether it was the year 1914 or 1915?

A I would say it was in the fall of 1914 or the spring of 1915—or in the first part of the year.

Q But you have no memory in which it was?

A No.

Q How long had that well been on production before that trap was put on?

A I couldn't tell you.

Q Had it just been brought in when the trap was put on the well?

A No, I think it had been on for some months. I couldn't say as to how long it has been on.

Q Didn't you know at the time?

(Testimony of Thomas I. Sharp.)

A Well, I suppose I did, yes.

Q Haven't you any recollection of it now?

A No, I have not.

Q Did they experiment on this Honolulu property quite a little with that trap, on this particular well?

A This particular trap, yes. They used this trap for experimenting.

Q It was the first one they had?

A Yes.

Q And it was the first pressure trap they had used on a well, was it not?

A No, they had used one before that.

Q On what well had the Honolulu Company used a pressure trap before that Trumble trap?

A On Well No. 5, Section 8.

Q A Trumble trap?

A No, not a Trumble trap.

Q Well, what kind of a trap?

A A McLaughlin trap.

Q Was that a pressure trap?

A Well, it would hold a pressure. I don't just understand—

Q Did they operate it to maintain a pressure within the trap, prior to their installation of this Trumble trap?

A Yes, it would hold a pressure.

Q How much of a pressure was maintained on that McLaughlin trap prior to the installation of the Trumble trap?

(Testimony of Thomas I. Sharp.)

A I don't remember, but it was low pressure, I would say.

Q What do you mean by low pressure?

A Oh, two or three pounds.

Q Oh. Practically no pressure, you mean?

A Well, it could have, I suppose.

Q I asked you how they operated it, not what could have been done.

A Do you want me to describe the operation of the trap?

Q I asked you if they operated that McLaughlin trap with any material pressure.

A No, they did not.

Q Well, why didn't you say so? Now the operation of a gas trap maintaining pressure within the trap was something new with this Trumble trap; was it not?

MR. WESTALL: We object to that as not cross-examination. That is one of the contentions in the last litigation, about pressure, spreading the oil on the surface. That is not material here and is not cross-examination.

MR. F. S. LYON: I am trying to find out what this man knows. He said a whole lot about the first operation of this first trap up there: now I want to show the court, if the witness knows the facts—and if he doesn't we will show that he doesn't know—what were the purposes of the operation of this trap in certain manners. I am trying to find out whether the witness knows what he is talking about, and in the next place

(Testimony of Thomas I. Sharp.)
I am going to test whether he is a frank witness whose testimony is entitled to weight with the Court.

MR. WESTALL: He has only testified as to certain obvious matters, matters of the oil level at which the trap was operated, and now he is being cross-examined as an expert as to the theory of gas traps. We do not believe it is cross-examination.

MR. F. S. LYON: He has testified a whole lot about some foaming questions, and grips, and sand, and so forth. I want to know what he knows about the operation of this particular trap.

(Last question read).

THE COURT: He may answer.

A Yes, that is the first of those traps we knew anything about.

Q BY MR. F. S. LYON: And the Honolulu Consolidated Oil Company tried various different manners of operating a well with that trap on it, did they?

MR. WESTALL: Same objection; and as incompetent.

THE COURT: Various ways, or adjustments? He may answer that.

A Yes.

Q BY MR. F. S. LYON: You don't know how old that well was at the time this trap was put on it?

A How old?

Q. Yes.

A No, I do not.

Q. What size trap was that?

(Testimony of Thomas I. Sharp.)

A That was the large size; I don't know what the number of the trap was.

Q What do you mean by large size?

A Well, it was not the smallest size; I remember that.

Q Wasn't that the first Trumble trap you ever saw?

A No, I had seen them before.

Q Where had you ever seen one before?

A I think it was on the Pacific Oil Company's property. I am not sure. I saw it passing on the road.

Q You never observed it particularly, though, did you?

A No, never.

Q Now what was the size of this first trap on the Honolulu property that you have referred to?

A Well, that was—I would like to ask if there are two or three sizes,—or were there at that time.

Q I am asking you. I want to know what your recollection is.

A It was the second size, then.

Q Now what is the difference between that and the first size you refer to?

A Well, the first size I would say, would be the small one. I would say the first size was the small one.

Q Well, was there ten or fifteen or twenty feet difference in the dimensions?

A I don't know the dimensions.

(Testimony of Thomas I. Sharp.)

Q Well, what is your best recollection?

A Well, it was larger in diameter. I don't know about the height of it.

Q Well, what was the diameter of this trap you refer to, on this first well, the first one on the Honolulu property?

A I don't know the dimensions.

Q You don't remember any of the dimensions?

A No.

Q When did you first see inside of that trap?

A Inside of that particular trap?

Q Yes.

A I couldn't tell you.

Q Will you swear that you ever saw inside of that particular trap?

A I will.

Q Under what circumstances?

A The float, which was a ball float, collapsed, and we took it out.

Q And put in a new ball float?

A Put in a new ball, yes.

Q Was the arm of that float straight?

A That was, yes.

Q Now when you observed that trap in operation was the arm and lever connected with the arm of that float in a horizontal position when the valve was closed?

A Read the question, please.

(Question read).

Q I mean the valve in the oil outlet pipe.

(Testimony of Thomas I. Sharp.)

A Well, I couldn't tell you.

Q You don't remember where it stood closed?

A No, we had no way of seeing inside there when it was in operation.

Q Wasn't there an adjustment in that link connecting between the float arm and the valve stem?

A An adjustment?

Q Yes.

A No.

Q No adjustment whatever?

A No.

Q Was there on any of those traps?

A I don't remember as to there being any when they came there. We put them on.

Q For what purpose did you put them on?

A To raise and lower the oil level.

Q So that you could adjust the oil level in the trap as you desired?

A Yes.

Q Who did that?

A The shop. They had it done at the shop.

Q At whose suggestion was it, do you know?

A Mr. Hardesty's.

Q Was that to carry a lower oil level?

A No,—Well, I am not sure about that.

Q Well, was it to carry a higher oil level in the trap?

A It was to adjust it to take care of the oil going over into the gas line.

(Testimony of Thomas I. Sharp.)

Q Well, which was it—to lower the oil level in the trap or to raise it?

A Both, to raise it or lower it.

Q Well, which adjustment did you actually use?

A We finally used the one that came with the trap —that is, the same adjustment.

Q Now will you please tell me what you mean when you say that a high oil level gives more time for the sand to settle out of the oil? Explain to the Court just what your views are on that.

A Well, my observation is this, that it would be as a river flowing into a large body of water: it would deposit its sand and debris there at the mouth of the river, and as it would fill up and make a body of water, shallow, it would cut another channel through to a greater depth to carry on farther into the ocean or bay. Now that shows that when a small stream strikes a larger body it expands or spreads that larger body and moves slowly, allowing the sands to settle to the bottom. And so it was, as we found, in the gas traps. Of course in the early days we didn't know about those things and we didn't know our trouble or how to get away from it, but we found in later years when other traps came out that it was actually a fact that the larger the body of oil you could hold in the trap the more time it would give for the sand to rest on the bottom.

Q Now just what do you mean by a larger body of oil in the last portion of your last answer?

(Testimony of Thomas I. Sharp.)

A That larger body—I don't just understand your question.

Q Neither do I understand your answer. What do you mean in your last answer by a larger body of oil in the trap?

A A body that could be carried larger than the original traps carried.

Q Well, do you mean a larger volume, more gallons, or barrels, or pints, or quarts, in the trap?

A Yes, sir.

Q Then you would get the same effect, would you, if you had a trap of twice the diameter and of one-half the height of column of oil?

A Well, I don't know. I have never seen one built of that particular description.

Q Well, under your theory do you think you would get the same result, as far as this wonderful sand-settling feature is concerned, if you had the same volume but it was spread out in half the thickness, or would the action of settling be greater or less?

A Well, I don't know. It would be pretty hard for me to say.

Q You never observed whether the sand would settle through an inch of oil quicker than through a foot?

A Well, that is getting pretty fine. I would say it would not. No. I would say that the shallower the body the less it would settle.

MR. F. S. LYON: That is all.

(Testimony of Thomas I. Sharp.)

MR. WESTALL: That is all. Now, if the Court please, in order may have as early notice as possible of the matter, we would like to make an application to the Court for leave to take the deposition of a witness mentioned by Mr. Paine at Taft. We have here an affidavit of what that witness will testify to, showing its extreme pertinency, and the ground of our application to the Court is that we were not given notice as required by Section 4920 of the places where these alleged prior uses were had, consequently we had no sufficient opportunity to prepare for cross-examination nor to secure our witnesses or take depositions on rebuttal. We expected the witness to be here. Of course we have no power to subpoena him from Taft, but we expected him to voluntarily attend, and we now learn that he will be unable to do so. The affidavit that I have is as follows: "E. R. Pratt,—"

MR. F. S. LYON: If your Honor please, we object on the ground that it is obvious that it is a proceeding which has no standing. The subpoena of this Court will reach a man in Taft. That is within the Southern District of this State, and a subpoena will run for the whole of the District, and there is no question about it. As far as that is concerned, there cannot be any reason for attempting to read into the record an ex parte affidavit of a witness. We object to the interruption of the trial in this manner.

(Testimony of Thomas I. Sharp.)

MR. WESTALL: The witness is more than one hundred miles from the place of trial. Under those conditions—

MR. F. S. LYON: You had the right to take his deposition before trial; but a subpoena will bring him here if you want him.

MR. WESTALL: No, a subpoena will not bring him from more than one hundred miles from the place of trial; and, furthermore, we had not sufficient notice of the nature of this defense, consequently would not be able to take the depositions which we might have taken under Sections 863, 864, and 865; and not having notice, we have relied upon the promise of attendance of the witness, and in order to show the justice of this application we offer to read the affidavit to the Court. Here is a man who is in charge of the very wells up there from the time they were first put in, and this witness will testify just how they were operated. He had actual charge of those traps.

MR. F. S. LYON: We further object, your Honor, on the ground that it appears that they have had all of this time and could have had this man here. They expected him to be a voluntary witness, and have not taken his deposition before trial, and to interrupt the trial for the purpose of taking the deposition would be a very unusual proceeding, and there is no reason why they cannot bring him here if they want him. They have not even proceeded, I will say, in good faith, because they have not made a suggestion of this during the more than two weeks interruption we have

(Testimony of Thomas I. Sharp.)

had. Counsel is very careful in this whole case simply to make this trial as much of a nuisance as he can. He could have had these depositions here. This case has been tried before. There is not a new thing in it. This testimony in regard to the Honolulu traps was in the case before. Mr. Gutzler testified, and so did all the other witnesses except one or two.

MR. WESTALL: If you didn't want another trial you surely would not have asked for it; and you have not pleaded these defenses. We were entitled to thirty days notice of the defenses, and that thirty days notice was not given to us. They gave the name of the Honolulu Consolidated Oil Company, but didn't give the place where it was used. And I think under the circumstances we ought to have a right to take the testimony of this witness.

THE COURT: I hardly think at this stage of the proceeding, Mr. Westall, I shall make any order for the taking of a deposition. It may be your witness will be here before the trial is over, or can be procured. I will allow you to file the affidavit, and make an order denying the motion, and let the record show your exception.

MR. WESTALL: Yes, we would like to have an exception. May I read the affidavit, or shall it be considered as read?

THE COURT: It may be considered as read, and you may file it so that it will be in the record.

WILLIAM G. LACY,

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESTALL:

Q Please state your name.

A William G. Lacy.

Q What is your business, Mr. Lacy?

A I am employed by the Lacy Manufacturing Company.

Q Are you acquainted with Mr. David G. Lorraine, the plaintiff in this case?

A Yes, sir.

Q How long have you known him?

A Since the year 1919.

Q And what time in the year 1919 did you become acquainted with Mr. Lorraine?

A About the middle of the year. I would say July or August, according to my best recollection.

Q Did Mr. Lorraine ever explain to you an invention of oil and gas separators?

A Yes; when I first met him he came to our office and asked me regarding our manufacturing his separators. He had drawings and so forth and explained it to me as well as he could—or as well as I could understand it.

Q BY MR. F. S. LYON: When was that?

A He brought drawings with him and explained it to me.

(Testimony of William G. Lacy.)

Q I say when was it?

A In either July or August, to my best recollection, of 1919.

MR. F. S. LYON: We object, your Honor, on the ground it is totally irrelevant, and immaterial. The application for the original patent was filed in 1920, and there is no alleged prior use that was not more than two years prior to the application. It is a mere waste of time to go into the question of whether Mr. Lorraine got up this invention in 1919 or 1920.

MR. WESTALL: The defendants have been in the business of making gas traps continuously since 1914, and as to the dates of all these blueprints here before the Court, we do not know which one we are going to rely on yet. Now we are carrying back the date of invention to prove that we invented this long before the date of our original application. Of course the law carries us back, certainly, to the date of our original application, but we go as far back of that as we can go, within two years, or over two years. Now this witness is to testify to certain disclosures and drawings shown to him.

THE COURT: The objection is overruled.

MR. F. S. LYON: Exception.

Q BY MR. WESTALL: Please state what Mr. Lorraine explained to you at that time with regard to this invention.

A Well, he explained the construction of the separators in general, showing me the drawings in order

(Testimony of William G. Lacy.)

that I would be able to estimate the cost and give a quotation.

Q Did he show you certain drawings or sketches?

A Why, he had several drawings.

Q Will you please describe what those drawings were and what they showed?

A They showed the general construction of his separator. Some of them were assembly drawings, others showed certain details.

Q Can you describe the separator that formed the subject-matter of those drawings and state the discussion you had with Mr. Lorraine concerning them?

A I can explain it in a general way. The separator consisted of a tank, and in the interior of the tank was placed a float which operated the valves. It also had certain baffles.

Q Did you finish your answer?

A Why, yes.

Q Do you remember how the baffle was located with respect to the oil inlet?

A. Yes. The baffle was a vertical partition that was riveted to a shell on each side, and I believe the oil entered the top of the separator, coming in between the baffle and the shell.

Q And where was the float mounted?

A The float was on the opposite side of the baffle from the oil intake.

Q And do you remember how the oil level was controlled or affected in the operation of the device?

(Testimony of William G. Lacy.)

A The float regulated the level of the oil—the action of the float, the rising of the oil, regulated the height of the oil by operating valves.

Q What level of oil was the device designed to carry, if you know?

MR. F. S. LYON: We object to that as leading and suggestive. The witness has not referred to any such thing. And it is objected to as assuming a fact.

Q BY THE COURT: Did the drawing as you saw it, taken together with the explanation of Mr. Lorraine, inform you as to what level of fluid could be carried in the cylinder?

A The drawing itself did not show the level of the oil, although the floats were in the upper portion of the trap and the oil would necessarily have to rise to the float in order to operate it.

Q BY MR. WESTALL: Now you have spoken of a vertical partition. What was the construction of the remainder of the trap, outside of that partition? How was it designed?

A Well, the valves were mounted on the outside of the trap, and there was also a base on which to support the trap, and in the top of the upper head there was a manhole. I believe that is the essential features. I don't remember the small details.

Q What was your employment at that time which led to your having seen this trap or being shown this trap by Mr. Lorraine?

A I was an estimator and salesman.

(Testimony of William G. Lacy.)

Q Did you have a discussion with Mr. Lorraine regarding the merits or demerits of the construction?

A We had a general conversation. It is rather hard to remember the exact words that were said.

Q Can you remember in substance anything that was said regarding the merits of the different features of the construction?

A Well, that is rather hard to do. It has been quite a while, and we had so many conversations after that that I don't believe I could—

Q Do you remember the kind and character of the drawings that were shown to you by Mr. Lorraine at the time that you had that first conversation with him?

A He had two or three drawings drawn with ink on white paper, and he also had one or two ordinary blueprints, and some pencil sketches—he had quite a collection.

Q Referring to Plaintiff's Exhibit No. 32, did you ever see this drawing before (handing paper to witness)?

A The drawing is drawn similar to some that he had, although I couldn't identify this. It has some features that were shown on his other drawings, although I don't believe I have seen this one.

Q You said there were certain features on this drawing that were similar. What features did you refer to?

MR. F. S. LYON: We object to the witness being given this particular drawing by which to reproduce something else. It is not proper cross-examination.

(Testimony of William G. Lacy.)

Some foundation at least for the failure to produce the other drawing ought to be laid, and the witness ought at least to testify so far as he can without placing a drawing before him which was not the one that he had. It is the most leading way you can examine a witness in that respect.

THE COURT: Yes. I suppose he can illustrate it by making a sketch himself.

MR. F. S. LYON: It might be very enlightening if he would draw a sketch of that trap, or attempt to. I have a few reasons for that observation.

Q BY THE COURT: Mr. Lacy, have you the drawings that were explained to you sufficiently in mind so that you could with a pencil make a rough sketch of them?

A No. I have it in mind in a general way. I couldn't reproduce the one I saw.

Q Could you generally illustrate the idea on paper with pencil? If you can you may do so.

(Witness makes a pencil sketch).

A I believe that represents it in a general way.

Q BY MR. WESTALL: This sketch which you have produced you say represents in a general way the construction of the trap that was illustrated in the blueprints and drawings and was explained to you by Mr. Lorraine?

A Yes, sir.

Q BY MR. F. S. LYON: And does it represent all of the details that you now remember?

A Yes, sir, it does.

(Testimony of William G. Lacy.)

MR. WESTALL: We offer the sketch in evidence as Plaintiff's Exhibit No. 33.

Q Now in making the sketch have you attempted to preserve the proportions and dimensions in any way?

A It is not drawn very accurately as to scale.

Q It merely represents a general idea of what you recall as having been exhibited to you by Mr. Lorraine at that time; is that correct?

A Yes, sir.

Q When did you say you first saw the drawing or blueprint such as you have illustrated in Plaintiff's Exhibit No. 33?

A To my best recollection it was in July or August, 1919.

MR. WESTALL: That is all.

CROSS EXAMINATION

BY MR. LYON:

Q Have you told us, Mr. Lacy, all you can remember about that?

A About the construction of the separator, you mean?

Q Yes.

A Well, there is one thing I might say that—I have shown one float on that sketch. Some of the sketches, or one of the sketches—showed two floats bolted together, and both acting as one.

Q Is there any other detail that you can remember?

A No, sir, I believe that covers all that I can remember at this time.

(Testimony of William G. Lacy.)

Q What connection have you with the Lorraine Corporation?

A I have no direct connection with them.

Q Are you in receipt of a salary from that company?

A Not at this time, no.

Q Have you been receiving one?

A I have in past times.

Q For how long?

A About two years, I believe.

Q When did you cease your connection with the company?

A It was some time last year; in the latter part of the year.

Q What interest has the Lacy Corporation in the Lorraine Corporation?

A Interested in what way?

Q In any manner, financially, in the business.

A Financially, no.

Q You manufacture the Lorraine separators for the Lorraine Corporation, do you?

A We are manufacturing portions of them.

Q Has your father an interest in the Lorraine Corporation?

A No, sir.

Q None of the family?

A No, sir.

Q To whom did you dispose of your interest?

A I never had an interest.

(Testimony of William G. Lacy.)

Q What portion of the separators are you now manufacturing for the Lorraine Corporation?

A We are doing what we call the boiler work, making the shells, or the tanks, and the floats.

Q Don't you remember any part of the conversation with Mr. Lorraine in regard to the valve mechanism for this separator?

A No, I don't believe I could.

Q He didn't say anything to you about what the valves or the float would operate?

A Oh, he explained that the float would operate the valves.

Q What valves?

A The oil and gas valves.

Q In what maner?

A Well, naturally the float on rising with the level of the oil would operate the valves as they were connected thereto.

Q In other words, the float was operatively connected to both the oil and gas valves so that the actuation of the float opened one and closed the other; isn't that correct?

A I believe it was.

Q That was one of the particular things that he explained to you at that time, was it?

A Well, now, I couldn't say whether he explained it to me at that time or later. I naturally learned that at some time, but whether it was during the first conversation or later on I don't know.

(Testimony of A. P. Pew.)

Q You will not state positively that that was not the particular thing that that conversation was about, will you?

A No; I couldn't state that.

MR. F. S. LYON: That is all.

MR. WESTALL: That is all.

(Thereupon a recess was had until Tuesday, May 13, 1924, at ten o'clock a. m.).

LOS ANGELES, CALIFORNIA, TUESDAY, MAY 13, 1924. 10 A. M.

(Appearances as previously noted).

A. P. PEW,

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESTALL:

Q Please state your name.

A A. P. Pew.

MR. WESTALL: If the Court please, this affidavit that your Honor gave me permission to file I would like, if the Court will permit, to have it copied into the record.

MR. F. S. LYON: We object, your Honor. It cannot be anything more than an affidavit for leave to take depositions. It is not a proper part of the record in the trial, and it is not a proper part of the tran-

(Testimony of A. P. Pew.)
script of testimony. It is an application, which is not a part of the record.

THE COURT: It is technically not so, of course. When parties present an application for a continuance or things like that it isn't a proper part of the record.

MR. F. S. LYON: The object of that, in case of an appeal, is to require it to be carried up as a part of the appeal record and to argue on it. The whole matter of its presentation ought to be done formally and not be copied in as a part of the transcript in the case. It isn't a part of the testimony in any way, shape, or manner, and we object to it as incompetent and not the proper method of proof so far as the record is concerned. It is solely an application to take depositions, as I understand it, and that must be an independent proceeding and is not a part of the record.

MR WESTALL: If the Court please, it is an application made during the course of the trial, which was ruled upon and an exception preserved. It would naturally be assumed that the affidavit had been read. The Court hasn't heard the affidavit at all. Now it seems to me that the proper way to preserve it in the record is to put it in the record. Of course on appeal we cannot avail ourselves of the exception unless it is in the record, and if we have it copied in the record then it is in there.

THE COURT: I don't quite agree with you there. It is part of the files if it is filed. The fact that the application is made is shown in the record, and the ruling is made, and the documentary evidence in sup-

(Testimony of A. P. Pew.)

port of the application is on file and can be made part of the record in that way.

MR. WESTALL: Yes, it can be. It is merely for convenience.

THE COURT: That is what I thought; but if there is an objection I suppose it is not a part of the trial record. I don't see how it is rendered unavailable at all, and that is the reason I suggested you file it so that it will be here as one of the documents on file.

MR. WESTALL: I merely wanted it in the record. If we read this affidavit in court upon that application at that time it would naturally go in and be a part of the record taken by the court reporter. For that reason it would be convenient to have it in that form and have it indexed in the record for reference during the preparation of any appeal that may be taken by either side, rather than to have it on a separate piece of paper. I think that the court has discretion to allow that. It is merely a matter of convenience and nothing else. Its legal effect isn't any different.

MR. F. S. LYON: It only adds to the expense, and if counsel takes an appeal he can include it himself. I object to the lumbering of the reporter's transcript with matters which ought not to be there.

THE COURT: Technically I will sustain the objection, but I don't think it makes a bit of difference myself. If it rendered it less available I would be inclined to let it go in the record, but I don't think it does. That is the reason I suggested that you file it.

(Testimony of A. P. Pew.)

MR. WESTALL: Note an exception.

Q Where do you reside, Mr. Pew?

A In Huntington Beach.

Q What is your business?

A Oil business.

Q How long have you been engaged in that business?

A Since 1911, in California.

Q Are you acquainted with Mr. David G. Lorraine?

A Yes, sir.

Q How long have you know him?

A Since 1917.

Q Did Mr. Lorraine ever explain to you an invention in oil and gas separators?

A Yes, sir.

Q When did he explain any such invention to you for the first time?

A Well, that was in 1918, the last of 1917 or the first of 1918; I don't just remember the exact date.

Q What did he explain to you at that time?

A Why, he explained to me that he was working at that time on an invention of an oil and gas separator, and he explained to me the different parts of it. He told about the float, and baffle plates in this trap to protect the float from the flow of oil and gas or sand, or whatever might injure it, and it had separate chambers in it to separate the oil and gas and sand. It had a compartment in the bottom for settling, for the sand to settle, and means for getting away

(Testimony of A. P. Pew.)
with the sand, separating the sand and oil and gas. The flow of the oil, as he explained to me, entered the top of the trap and it flowed against this baffle plate, and then it ran down the trap by a partition to protect this float, is the way I understood it.

Q What is your best recollection as to the time he first made that explanation to you of this invention?

A Well, now, I think that would be about the first of 1918.

Q At that time did he show you any sketches or drawings?

A Yes, sir.

Q You never kept any of those drawings that he showed you? He just showed them to you, didn't he?

A He just showed them to me.

Q After that did you have any further conversation with him regarding this same invention, and did he show you any other drawings?

A Well, I have seen other drawings, but I don't just recollect what they were.

Q Please look at the drawing I now show you, being Plaintiff's Exhibit No. 32, and state if you have ever seen that drawing before.

A Yes, sir, I have.

Q Is that the drawing of the trap that Mr. Lorraine explained to you?

A It is; yes, sir.

MR. F. S. LYON: We object to that as leading and suggestive.

THE COURT: Yes, it is leading. He has answered, though.

(Testimony of A. P. Pew.)

MR. F. S. LYON: I move to strike the answer from the record on the ground the answer was given before I had an opportunity to object.

THE COURT: He would merely repeat the answer, so I don't know what good would be gained by doing that. Proceed.

Q BY MR. WESTALL: Do you recall whether you signed and dated any of these drawings that were shown to you?

A Yes, sir.

Q Will you look at this signature and date upon the slip of paper I now hand you and state whether that is your signature?

A Yes, sir; it is.

Q Please explain what, if anything, this slip of paper which I last handed you had to do with the drawing Plaintiff's Exhibit No. 32.

MR. F. S. LYON: We object to that as leading and suggestive. It puts in the mouth of the witness everything that counsel wants to get.

THE COURT: What it had to do with it is the leading part. Let him explain what that slip of paper is.

A This slip of paper is a part of the paper of which this drawing is.

Q How did it become a part of it?

A I don't know how it became separated.

Q Do you mean it was on there when you saw it?

A Yes, sir.

MR. WESTALL: If your Honor will notice, and we will have other evidence along that line, it got

(Testimony of A. P. Pew.)

creased here and broke off. It is part of the same slip of paper, as your Honor can see.

Q BY THE COURT: It was all together when you saw it?

A Yes, sir.

Q And the writing was the same then as it is now?

A Yes, sir. That is my signature, and I also recognize the signature of Mr. Pietzschke.

Q BY MR. WESTALL: The signature has after it the date August 26, 1918. What does that date signify? What was that date put on there for?

A Well, I think that he had that put on there when he sent these drawings on or when he made application for patent.

MR. F. S. LYON: We object to that as incompetent and move to strike it from the record.

THE COURT: Yes; that is incompetent. It may be stricken out.

Q BY THE COURT: If you know, you may state, but your opinion is not competent.

Q BY MR. WESTALL: Did you put this on there?

MR. F. S. LYON: We object to that as leading. If the witness knows anything about that date let him speak it.

A That date is my writing.

Q BY THE COURT: Do you know when you wrote it?

A August 26, 1918.

(Testimony of A. P. Pew.)

Q BY MR. WESTALL: At the time you signed it?

A Yes, sir.

Q Why did you put the date on there?

A Well, that was when he was applying for a patent, as I understood it, for an application for a patent.

Q Just to indicate the time when it was signed?

A Yes, sir.

MR. WESTALL: We offer in evidence the slip last referred to as Plaintiff's Exhibit 32-A, and ask that it be attached to the exhibit in some secure way so that it won't be lost.

THE COURT: It may be done.

Q BY MR. WESTALL: Referring to the drawing Plaintiff's Exhibit No. 32, which you have last referred to, will you please explain what you understand by the different parts that are indicated therein? You will notice that there is a part I have marked "A", a part "B"" and a part "C".

A The part A is where the oil enters the trap; B is this baffle plate that the flow of the oil strikes; C is the partition running up the trap horizontally to protect the float, as I understand it, the way it was explained to me, I think.

MR. WESTALL: That is all.

CROSS EXAMINATION

BY MR. F. S. LYON:

Q Is this the only drawing that Mr. Lorraine showed you on August 26, 1918?

A At that time, yes, sir.

(Testimony of A. P. Pew.)

Q Did he at that time explain to you what valve or valves were controlled by the float?

A Yes, sir.

Q What were they?

A Well, there was supposed to be a rotary valve, as I understood it.

Q For what purpose?

A Well, for the purpose of controlling the flow of oil and gas.

Q In other words, the float was connected so as to automatically operate both of those valves at the same time?

A To automatically control the ffow of the gas and oil; yes, sir.

Q And you remember particularly, do you, Mr. Lorraine's talking with you about the automatic control of both the oil outlet and gas outlet valves?

A Yes, sir. As I had it explained to me, this valve controlled them both.

Q Was that one of the particular things that Mr. Lorraine was talking to you about at that time?

A Well, now, as I remember, he explained to me that this float and valves worked automatically and held the oil above the center of the trap.

Q Looking at this drawing Plaintiff's Exhibit No. 32, what did Mr. Lorraine have to say in regard to the position of the float as it is there indicated? Is that the position that the float held in the trap?

A Well, now, I don't just understand you.

Q Is that the position of the float that Mr. Lorraine explained to you at that time?

(Testimony of A. P. Pew.)

A I think so.

Q Was the oil valve, the oil discharge valve, open or closed when in that position?

A Well, I tell you I don't know.

Q Was the gas outlet valve open or closed in that position?

A I can't tell you that. I can tell by looking at it, I guess.

Q Tell us where the oil outlet is in this drawing, Plaintiff's Exhibit 32, as you understand it.

A As I understand it, this here is the oil outlet valve.

Q Do you mean this pipe, the second one from the bottom?

A Yes, sir.

Q Where is the outlet inside of the trap?

A For the oil?

Q Yes.

A Here it is right here.

Q That is the outlet outside of the shell of the trap, isn't it?

A That?

Q Yes.

A Yes, sir.

Q How does the oil in the trap get to that outlet?

A It comes through this pipe.

Q Which pipe?

A The pipe leading to the valve.

Q Where is the outlet from the inside of the trap into that pipe?

(Testimony of A. P. Pew.)

A It is through here.

Q Away up here in this circle?

A Yes.

Q Will you please take and mark Plaintiff's Exhibit No. 32 where you say the oil outlet into that outlet pipe is on this drawing?

(Witness marks on drawing).

Q Isn't this the point right here that you indicated to me? Please answer the question. Isn't that the point you just indicated to me?

A Yes, sir.

Q Now mark that with a line out to the side. You have put the letter "X" on it in pencil.

A Yes, sir.

Q Having identified where the oil in the trap enters this outlet pipe, will you please explain to the Court where the gas gets out of this trap as Mr. Lorraine explained it to you at that time?

A Well, the gas would escape through the entrance.

Q Well, where is it in this drawing?

A On the top there.

Q The pipe at the top of the trap here?

A Yes, sir.

Q And this is supposed to be the gas outlet valve, is it?

A Yes, sir.

MR. F. S. LYON: I don't know whether your Honor has seen this drawing or not.

THE COURT: Yes; I looked at it before.

(Testimony of A. P. Pew.)

MR. F. S. LYON: The witness states that this is the outlet for the oil and this is the pipe leading down there, and this is the valve which controls it, and this is the outlet for the valve at the top, and that is the valve which controls it.

Q Is that correct?

A Yes, sir; that is the way I understand the drawing.

Q Mr. Lorraine explained to you that this float in this exhibit was mounted so that it would always carry vertically, being pivoted or hinged to the levers at the top and bottom, didn't he?

A Yes, sir. As he explained it to me it worked automatically.

Q And always rode in a vertical position due to the rocking on these levers?

A Well, naturally that would control it.

Q That was a feature that he particularly referred to, was it?

A Yes, sir.

Q This baffle B at the top, the oil entering struck that baffle, did it?

A Yes, sir.

Q And that baffle delivered the oil over onto the wall of the receptacle and kept it away from the float?

A Yes, sir.

Q And by that means protected the float?

A That is the way I understood it; and this partition here also.

(Testimony of C. C. Farrah.)

Q What was that vertical partition marked "C" supposed to do?

A As I understand it, it had practically the same use, for keeping the oil and flow of the oil down the side of the trap away from the float.

Q Did Mr. Lorraine tell you that the oil and liquid level on the right-hand side of this vertical partition C would stand at a higher level than the liquid in the main portion of the trap at the left-hand side of that partition?

A I don't understand you.

Q I say, did Mr. Lorraine tell you that the liquid level in here on this side of the partition C would stand at a higher level than the liquid on the opposite side?

A Why, I don't know as he explained that to me.

Q He didn't tell you anything about that, did he?

A No, I don't think so.

MR. F. S. LYON: That is all.

MR. WESTALL: That is all.

C. C. FARRAH,

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESTALL:

Q Please state your name.

A C. C. Farrah.

Q Where do you reside, Mr. Farrah?

(Testimony of C. C. Farrah.)

A Huntington Beach, California.

Q What is your business?

A I have had charge of production for the Southern California Drilling Company for about thirteen months.

Q Prior to that time what had been your business?

A Immediately prior to that I worked on a gasoline plant at Huntington Beach for two months.

Q Were you ever employed by the Honolulu Consolidated Oil Company near Taft?

A Yes, sir.

Q When were you so employed?

A Three different times.

Q Please be more definite as to those times.

A The first time was in 1912, I think in September, and from then until 1914 in June. Then I was off until April 5, 1915, and from then to July 6, 1915.

Q While you were employed by the Honolulu Consolidated Oil Company at the times you have last mentioned what were your duties?

A The first time or the second time?

Q The first time was what year?

A 1912. I was pulling wells at that time.

Q And in 1915?

A In 1915 I went back to the lease, on the 5th of April, and worked for a few days in the gang, and then I was transferred to Section 6 as a watchman and pumper, and so forth, there, until July 6.

Q Are you acquainted with Paul Paine?

(Testimony of C. C. Farrah.)

A Mr. Paine was the superintendent there this last time I was there.

Q Did you ever have any opportunity of observing the Trumble gas trap while you were employed by the Honolulu Consolidated Oil Company?

A Yes. I had considerable experience with that.

Q When did you first have an opportunity of observing the operation of the Trumble gas trap while you were so employed?

A The first time I took care of one was on Section 6, that is, after April 5 when I went back there. They transferred me over there, and that is where the trap was.

Q April 5, 1914?

A 1915; and a few days after that I was transferred from the roustabout gang to this job over there.

Q What were the numbers of the wells that you referred to on Section 6?

A The numbers have been changed since I was there, but then they were numbered 6-2, 6-3, 6-5, and 6-7.

Q How long a time did you have an opportunity of observing the operation of the Trumble gas trap at the Honolulu Consolidated Oil Company?

A From the time I went on this job until July 6. That would make about three months.

Q During that time did you observe the oil level as it was carried by those traps?

A Yes, sir.

(Testimony of C. C. Farrah.)

Q What did you observe with regard to the oil level?

A Well, the oil level when the trap was working properly I would say was about two to three inches above the bottom of the glass.

Q Did the oil level ever, during the time—

MR. F. S. LYON: We object to counsel leading the witness. Let him eplain what he knows about this.

Q BY MR. WESTALL: Then just explain all you know about the height of the oil level as shown by the gage glass during the time you were employed on the different Trumble traps, if there was more than one.

Q BY THE COURT: As to whether it varied or whether it remained the same.

A It varied considerably. Sometimes the trap would fill full of oil,—it often would—and go over into the gas line, which was very disastrous then on account of the gas being run into the compressor, and you couldn't have any oil in the compressor. That was quite frequent. At other times it seemed like the valve would stick and the gas would blow through, down, and blow all of the oil out of the trap, and the gas would blow through the oil line, and this caused me a little trouble because the oil line went from the trap down to a little receiving tank, down in a little canyon, you might say, between two hills. The wells were, you might say, on a side-hill, and the tank was down between the two in kind of a canyon or draw. We had a tank down there with a wooden cover on it, made out of 1x—

(Testimony of C. C. Farrah.)

Q BY THE COURT: Did you find upon examination at those times when the gas blew the oil out, as you say, that the valve had stuck?

A The valve would be tight.

Q Tight open?

A Tight open, yes, and it would blow the oil through the cover on this tank because it wasn't very tight. It didn't have a metal cover on it, and it would blow out and spray away around there, and the oil would run down into a sump hole we had, and had to be picked up then with a pump. The valve could be released by taking hold of the little lever that came out from the float. You could move it up and down with your hand and loosen it.

Q Where was the sticking; in the valve itself or in the float arm?

A It seemed to be the valve that would stick.

Q If the valve didn't stick did you have any trouble with it blowing out?

A As long as it worked all right it seemed to be all right. If it would hold two or three inches in the glass it seemed to work all right.

Q What occasioned the overflow in the gas line, as you ascertained it at the times it did?

A Well, the valve would stick shut; the valve on the oil line would stick shut, or so nearly shut that it wouldn't release the oil fast enough, and it would fill up in the trap and the gas would be clear full, and of course it would go clear over into the gas line. We had to put drips on the gas line, if that amounts

(Testimony of C. C. Farrah.)
to anything, to take care of this trouble, and I had to take a test of these drips often to take the oil out. They were made of ten- or twelve-inch pipe and sometimes as high as three joints, on an incline, so they could fill clear full of oil, and you could clean it all out at the lower end.

Q You would just blow it out?

A We had a two-inch valve, I think it was, on the lower end, and we would blow it out there, and it would return to the little sump hole down below.

Q BY MR. WESTALL: How did you endeavor to maintain, or did you attempt to maintain, any particular level in those traps, and, if so, what level?

A It seemed the natural level of the oil was as I told you. Then if we saw it varying from there I would go and operate this lever by hand until it loosened up and settled back to its proper place.

Q If you did not do that there was danger of the oil going over into the gas line, was there?

MR. F. S. LYON: We object to that as leading and suggestive. The witness has told us what happened and counsel ought not to put words in his mouth.

Q BY THE COURT: The question is whether the valves required constant attention.

A Yes; I would attend to them pretty often. I should have attended to them oftener than I did because we got into trouble several times. Of course it didn't go very good with the foreman when the oil got into the gas line, and he would tell me about

(Testimony of C. C. Farrah.)

it. Mr. Charles Hardesty was the name of the foreman.

Q BY MR. WESTALL: Do you know where Mr. Hardesty is at the present time?

A No, sir.

Q Who else was connected with the plant during the time you were there?

A There were two of us. We had 12-hour tours then. Mr. Tannehill was working opposite me.

Q Was Mr. Pratt employed there by the company during the time you were there?

A Mr. Pratt was the superintendent of that division.

Q To your knowledge did Mr. Paul Paine ever observe the operation of those traps while you were attending to them?

A Mr. Paine was over there once while I was there, but I don't think he looked at the traps.

MR. F. S. LYON: We object to the last answer on the ground it is incompetent, and move to strike it out, especially that part "I don't think", and so forth.

THE COURT: It may be stricken out.

MR. WESTALL: That is all.

CROSS EXAMINATION

BY MR. F. S. LYON:

Q Then your trouble with these traps was the trouble with the valves, was it?

A I would say there wasn't enough oil backed up in the trap to make it safe. For such a little oil

(Testimony of C. C. Farrah.)

above this float and above this outlet it didn't take much to stick this valve and make it blow down there.

Q You knew that at the time?

A Why, sure.

Q It was perfectly obvious to you? You wanted a little more oil seal, is that it?

A We even tried to get a higher oil level by adjusting the levers, but it wouldn't work because it interfered with the baffle plates in there.

Q This trap that you were talking about was on what well?

A It was old 6-3. I don't know what number it is now.

Q What size trap was that?

A It was about thirty inches in diameter.

Q Do you remember how high?

A No, sir; I didn't have occasion to measure it.

Q Did you ever open that trap up and go into it at all yourself?

A I have taken that flange off where the float was fastened to it. The hinge or elbow there was through a flange that came off.

Q Was that float arm a straight float arm or bent up?

A It was practically straight.

Q Practically straight?

A Yes.

Q How high from the bottom of the tank was the oil outlet?

A From the bottom of the tank to the point of the cone, do you mean?

(Testimony of C. C. Farrah.)

Q Was this a cone-bottom trap?

A Yes, sir, a cone-bottom, with a 6-inch tee on the bottom.

Q How far from the bottom of the cylindrical portion of the trap was the oil outlet?

A Where the cone and the cylindrical part were welded together, or I guess they were welded—yes, they were welded—the outlet was four inches.

Q Four inches to the bottom of the cylindrical portion of the tank?

A That is, where it came up and started this way on the angle there.

Q Was that outlet connected by a pipe on the inside of the trap?

A The outlet?

Q Yes.

A I don't know how it was connected.

Q You don't know whether the oil outlet pipe extended down from this hole in the tank, down toward the bottom of that tank?

A No.

Q Do you know whether that pipe was turned upward?

A I can't say.

Q You never observed that?

A No.

Q Then the level that the outlet pipe would drain out of the trap might have varied several inches, so far as your knowledge of that arrangement was concerned, might it?

(Testimony of C. C. Farrah.)

A It would show in the glass, in that case.

Q Was this glass that you have referred to extended below this oil outlet?

A Yes, sir.

Q How do you know that?

A From the outlet where it came through the casing.

Q You mean the pipe which extended through the side?

A Yes, sir.

Q If you didn't know where the outlet below was you don't know, do you?

A I know by the glass where the level of the oil was in the tank.

Q How long a glass was it?

A 18 inches.

Q How near to the pivotal point of the float arm did the upper end of that glass come? Did it extend above it four inches?

A I don't believe I understand what you mean.

Q Your float arm extended through the trap?

A Yes.

Q And connected with the float, didn't it?

A Yes, sir.

Q And there was a pivot point of the float on the trap at the point where it extended through?

A Yes, sir.

Q How high above that pivot point did your gage glass extend in that trap?

A It extended above it.

(Testimony of C. C. Farrah.)

Q About how much? About four inches?

A Oh, no; more than that.

Q More than four inches?

A Yes.

Q There was no time that you ever saw the oil in those gages above the top of the oil gage, that is, the glass entirely full, was there?

A Certainly there was.

Q Then the level that you refer to is not one that was a constantly maintained level?

A When the trap was working properly that is where it stayed.

Q I suppose you observed this lever arm which extended out from the float, did you?

A Sir?

Q This lever arm which is connected with the float, which you say you worked up and down with your hand, in the normal working of that trap when it was working right that stood about horizontally, didn't it?

A I can't tell you exactly whether it was horizontal or not.

Q It was very close to horizontal, according to your recollection, was it?

A Yes; I think so.

MR. F. S. LYON: That is all.

(Testimony of Paul Paine.)

PAUL PAINE,

recalled on behalf of the Plaintiff, in rebuttal, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESTALL:

Q Mr. Paine, you were employed, were you not, and paid a retainer as an expert in this case on behalf of the defendants?

A I was employed by them. I have not been paid any retainer, and have not had any discussion of that subject, that is, of the subject of pay.

Q You understand that you are to be paid for your services as an expert, don't you?

A Oh, yes.

Q At the time you went up to Taft to look at the traps the last time did you have any conversation with Mr. Pratt regarding the oil level?

A Yes.

Q You did have a conversation with him about the oil levels?

A Yes. I had a conversation about this suit.

Q And did you ask him what he recollected about the oil levels that were maintained at those traps in those early days?

A I think I did. I can't recall definitely what happened. I remember I remarked to him about this suit that was going on and the fact that Lorraine seemed to feel that he had patented the proposition of maintaining the oil level above the center of the trap, and we had a laugh over that. Then what happened

(Testimony of Paul Paine.)

after that was not of great consequence, and I don't remember it at all clearly. It may well be that I asked him what his recollection was of the subject.

Q Do you know where Mr. Charles Hardesty is at the present time?

A My best knowledge of the subject is that he is in Ardmore, Oklahoma, but I was in Ardmore and did not hear that he was there. I have since been told that he moved to Ardmore. He left California and lived for a time in Muskogee, Oklahoma. He married a girl in either Ada or Francis, Oklahoma, and has been at those points at times.

Q Did you make any investigation on behalf of the defendants in this case to determine the location of Mr. Hardesty?

MR. F. S. LYON: We object to that as irrelevant, and immaterial, and a part of the plaintiff's case. This witness is not under cross-examination and the matter is entirely immaterial. It is a mere fishing trip and a waste of our time here.

THE COURT: Is this cross-examination, Mr. Westall? Are you calling him for cross-examination?

MR. WESTALL: I think it is both cross-examination and rebuttal, according to my theory.

MR. F. S. LYON: He called the witness to the stand as his witness. He didn't ask the privilege of the Court for further cross-examination or anything else, and the witness Paine never mentioned as a part of our case Mr. Hardesty's name, as I remember.

(Testimony of Paul Paine.)

MR. WESTALL: I think you are mistaken, Mr. Lyon. I think he mentioned Mr. Hardesty's name, you will find.

MR. F. S. LYON: Then you have been over the matter with him.

MR. WESTALL: I haven't asked him that question.

THE COURT: Is it for the purpose of showing that some witness accessible to the other side has not been produced? Is that the purpose?

MR. WESTALL: Yes, your Honor. That is all, or will you answer the question?

MR. F. S. LYON: If that is the only question, I will withdraw the objection, and let Mr. Paine answer.

(Question read).

A None whatever. I was not concerned with seeking Mr. Hardesty when I was East in connection with this case, nor for any other reason have I endeavored to get in touch with Mr. Charley Hardesty for years. As I say, I was in Oklahoma a few weeks ago on some entirely different business apart from this case, and I didn't even have Hardesty in my mind while I was there. As I say, I was in Ardmore at that time, and I met a very good mutual friend, and in a talk with him that friend at that time did not speak of Hardesty being in Ardmore. Since then I have been told, entirely in a casual way, that Hardesty is now in Ardmore, but I haven't sought him in connection with this case nor for any other reason.

MR. WESTALL: That is all.

(Testimony of Paul Paine.)

CROSS EXAMINATION

By MR. F. S. LYON:

Q When did you return from Oklahoma from this trip that you last spoke of?

A Well, it was a day or two before Easter.

Q It was either Friday or Saturday before the Tuesday when this trial commenced, wasn't it?

A Exactly.

Q And did you have any conversation with anybody connected with this case in regard to Mr. Hardesty at any time?

A What is that?

(Question read.)

A No, none whatever.

Q And it is since you returned to Los Angeles that that you received this information that possibly Hardesty is at Ardmore?

A Yes; since I returned here.

Q You don't know whether, as a matter of fact, he is there or not?

A No, I don't know where he is. I have had no occasion to try to find out.

MR. F. S. LYON: That is all.

THE WITNESS: Let me complete as to my return. It was early in the week before Easter Day.

MR. WESTALL: That is all.

(Testimony of W. A. Kelly.)

W. A. KELLY

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESTALL:

Q State your full name, please.

A W. A. Kelly.

Q What is your business, Mr. Kelly?

A Production foreman.

Q By whom are you employed?

A By the United Oil Company.

Q How long have you been so employed?

A Four years and three months.

Q Prior to that time what had been your business or employment?

A I was well puller for the Associated at Taft.

Q How long have you been connected with the oil business in any capacity?

A Since 1907.

Q During that time what different jobs or employments have you held?

A Why, I started out as roustabout in the Kern River fields and worked up to well pulling, dressing tools, and drilling, and production foreman.

Q Are you familiar with the Trumble gas trap, the subject-matter of this suit?

A A little bit.

(Testimony of W. A. Kelly.)

Q. How long have you known of the Trumble trap?

A Why, I have seen them for about five or six years, I guess, around through the fields.

Q Sometime in 1917 or 1918, would you say?

A No; not that early, I don't think. I think it was later than that.

Q It was later than that when you first became acquainted with them, was it?

A Yes; about 1919, I expect.

Q Do you know of the form of the Trumble trap with a ball float?

MR. F. S. LYON: We object to that as immaterial and not rebuttal unless it is confined to some of the particular traps which we have been giving testimony about. I want to call your Honor's attention to the fact again that this case was already tried once in this Court and all of these witnesses, and in particular this witness, were called as a part of the Plaintiff's case in chief. We had a right to believe that so far as his testimony went to their case in chief, and in attempted corroboration of their case in chief, that they had elected not to use him this time, and we certainly object under the rules of evidence to opening the case up again at this time, and I think the testimony should be confined strictly to rebuttal.

MR. WESTALL: If the Court please, these are preliminary questions to show the witness's familiarity with the subject-matter. Your Honor will remember

(Testimony of W. A. Kelly.)
that one of the facts which was emphasized and testified to by Mr. Townsend, Mr. Gutzler, and others was that the normal oil level of these old traps was up above the top of the gage glass; that the gage glass was only an indicator of the low oil level. Now we are rebutting that general testimony as to the normal level of those old traps, which are said to be anticipations.

THE COURT: Objection overruled. I will let him answer.

Q BY MR. WESTALL: Were you familiar with the Trumble trap to any extent and with the ball float?

A Why, we had one old trap and they had it up north there, and they sent it to Richfield. We thought we were going to get a big well down there and we didn't get much of a well, so we didn't set the trap up at Richfield. After that we started up at Signal Hill and we brought the trap down there. The production was pretty big down there and we had a well on there that we were going to bring in, and I sized the trap up and I didn't think it was capable of handling the well. It looked pretty small. So I talked to the superintendent and we talked it over, and he decided we wouldn't put this trap on but we would get a larger trap, a Lorraine trap. So we never used this trap down there at all.

(Testimony of W. A. Kelly.)

Q Are you familiar with the oil level that was maintained in that kind of traps, the Trumble traps?

MR. F. S. LYON: We object to that on the ground it is incompetent, the witness not having qualified to answer the question and it not being shown that he had anything to do with the operation of any of them so far.

Q BY THE COURT: Did you observe the Trumble traps at any time close enough to know anything about the oil level?

A No. The only time I observed it very much was this trap here that we had taken down there. We took it to pieces afterwards.

Q I mean in operation.

A No, not in operation.

THE COURT: Objection sustained.

MR. WESTALL: An exception.

Q Have you ever had occasion to examine any of those old Trumble traps known by you to have been in use prior to that time?

A No.

Q Are you acquainted to any extent with the comparative numbers of Lorraine traps and Trumble traps that are used in the fields at the present time?

MR. F. S. LYON: We object to that as immaterial and not rebuttal.

THE COURT: Objection sustained.

MR. WESTALL: Exception. I believe that is all.

MR. F. S. LYON: No questions, Mr. Kelly.

(Testimony of Ira B. Funk.)

IRA B. FUNK,

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESTALL:

Q Please state your name.

A Ira B. Funk.

Q Where do you reside, Mr. Funk?

A Alhambra.

Q What is your business or employment?

A I am with the Union Oil Company, in the research department.

Q How long have you been employed by the Union Oil Company and in what capacities?

A Since the latter part of October, 1918; first on gas conservation work; assistant superintendent of the gas department; then in charge of absorption plant construction, and later on in the research department, in charge of gas research and field development and production research problems.

Q What knowledge or experience, if any, have you had concerning gas traps?

A Well, the first work was practically in connection was gas traps, for conservation of gas, just before the close of the war. My first work was in that line.

Q Are you familiar with the construction and mode of operation of the Trumble gas trap made by the defendants in this case?

(Testimony of Ira B. Funk.)

A Yes, sir.

Q How long have you been familiar with the Trumble gas trap referred to?

A Well, I had seen them in the field, but I hadn't paid very much attention to them before I went to the Union Oil Company. I had seen them as early as 1917.

Q When did you first have an opportunity of observing the operation of the Trumble gas traps after that time?

A That was in 1918, the fall of 1918; in October, 1918.

Q What particular duties did you perform, if any, in connection with the gas traps or relating to them in any way at that time?

A Well, the first work I did was at the Brea field going over all of the leases, and more particularly the Hole lease, as we were trying to furnish our refinery with sufficient gas for operations from the Hole lease, and as it was running we didn't have quite enough and had to purchase something like half a million feet a day.

Q Are you familiar with the kind of gas traps that were used on the Hole lease that you have referred to?

A Yes, sir.

Q. What kind of traps were they?

A They were the McLaughlin and Trumble traps, at that particular time.

(Testimony of Ira B. Funk.)

Q Can you describe the construction of the Trumble trap that was used at that time on the Hole lease?

MR. F. S. LYON: We object to that on the ground there is no foundation laid. I would like to know what knowledge the witness has before he testifies.

THE COURT: Yes; I think it should be more particularly shown that he had knowledge of the construction, from observation or examination, or something like that.

Q BY MR. WESTALL: Did you at that time have any knowledge as to the construction and mode of operation of the Trumble gas traps that you have spoken of?

A Yes, sir.

Q What was the nature and extent of that knowledge?

A On one well we were having trouble with the gaskets leaking.

Q By the Court: On a Trumble trap?

A Yes, sir. The gasket was leaking at the manhole.

Q Do you remember the number of the well?

A I think it was 15 or 16; I wouldn't say positively which. There were two sets of tanks right together there. I got a gang from a lease to take that out, and at that time I looked in the trap. That was my first inspection of the interior of the trap.

Q BY MR. WESTALL: What did you learn as to the construction of the trap at that time?

(Testimony of Ira B. Funk.)

A Well, it had a ball, that is, so far as I could see. There was a cone overhead. You couldn't see but one cone—with a pipe leading up from the center of that cone. The oil outlet projected inside of the trap with an L on a short nipple pointing down.

Q BY MR. WESTALL: And what was the—

MR. F. S. LYON: Let him finish.

A That is all. That is as to the interior.

Q BY MR. WESTALL: What was the construction of the outside of the trap?

A This particular trap was a cylinder, I should say about thirty-six inches in diameter and probably six feet high, with a tapered cone at the bottom in the neighborhood of three feet on the angle,—

Q On the taper?

A On the taper;—and connected to the nipple, and the tee at the bottom on which it rested. The top had a casting, I believe, which was riveted on, about twelve inches in diameter, and it was brought in at the top, and about twelve inches high at the edge, the oil coming in at the side of this casting and going down into the trap around the pipe which conducted the gas out from the trap.

Q Did you see that trap in operation on any well?

A Yes, sir.

Q On what well?

A On the same well.

Q What well was that?

A As I say, I think it was Hole 15 or 16.

(Testimony of Ira B. Funk.)

Q After that what opportunities, if any, did you have of observing these Trumble gas traps in operation?

A Well, I observed all of those on that lease, in fact I got myself into trouble over making some adjustments on them. We were blowing considerable gas through the oil lines into the tanks, and in trying to conserve the gas I tried to adjust them to carry more oil, to keep it from blowing through, and that night some of that blew over into the oil line and they raised Cain.

Q Were those traps equipped with glass gages?

A Yes, sir.

Q How many traps were there that you have referred to?

A Six.

Q Can you give the locations of those traps at the time that you have referred to?

A Hole 6, 13, 18, 14, 15 and 16, I believe.

Q You say that you made an attempt to adjust the level so as to prevent the gas or the oil from going over into the gas line. What adjustments did you attempt to make?

A By changing the linkage on the outside so as to let the float ride higher.

Q What success did you have in making that adjustment?

A Well, the lease foreman kicked so much about the oil going over into the gas line that I had to change

(Testimony of Ira B. Funk.)
all but two of them back to where they were originally, that is, as set when I came on the lease.

Q Did you have an opportunity of observing the oil level that was carried in those traps as shown by the gage glass at that time?

A Yes, sir.

Q Where was the oil level?

A The oil level was out of sight in most of them, at the time I started in on the adjustments, and I managed to work it up about two to three inches except on Hole 6, where we could possibly squeeze that up not over half way on the gage glass. That well was a very steady well and not very much gas, and consequently we didn't have much trouble with it.

Q When you say the oil was out of sight what do you mean?

A I mean by the way they had the traps adjusted when I went on the lease, that they had—

Q BY THE COURT: You mean no oil was showing in the glass?

A No oil was showing in the glass. They were afraid of the oil going over into the line and into the absorption plant. The absorption plant had no scrubber, and it would fill up the absorbent oil with crude oil and then they would have to get a new batch of absorbent oil, and that meant quite a little expense to them.

Q BY MR. WESTALL: You mentioned six traps, I believe, on the lease, among which were Hole 6 and 18, I believe. Was the level maintained by

(Testimony of Ira B. Funk.)

you after you got the traps adjusted on those substantially the same, that is, near the bottom of the gage glass?

MR. F. S. LYON: We object to that as leading and suggestive.

THE COURT: Yes. Let him state as to that. After you worked out a line of adjustment, if you did, where did you carry the oil?

A Well, the wells that flowed steady carried as much oil as I deemed safe, which was four to six inches in the gage glass, and I remember particularly on Hole 18 my first attempt at adjusting. When I went to work there I had gotten over a long spell of sickness, and Hole 18 was up on the hill, and I sat down there after making the adjustments—I was all out of wind—and probably sat there for an hour watching it. I had it adjusted so that the oil was up about half way in the glass, and while sitting there I noticed alongside of the trap a valve, in the way of a safety value, that the oil had begun to leak out of, and I looked up at the trap and the gage glass was full of oil, and I immediately pulled down on the valve lever to open up the valve and let the oil out, and then changed the adjustment back to where it was, to carry less oil.

Q BY MR. WESTALL: With regard to the other wells that you have spoken of other than Hole 18, what have you to say as to the oil level that was maintained, or attemnted to be maintained, by you at that time?

(Testimony of Ira B. Funk.)

A Well, I personally never attempted to maintain over a maximum of about six inches.

Q What was the usual level in most of those traps that was found to be practical for maintenance?

A Well, at that time I had them set to run at just as low a level as I could and keep it in sight; in other words, I didn't want to break the seal. I tried to strike an equilibrium, that is, one point where it wouldn't break the seal and another where it wouldn't go over the top into the gas line.

Q Did you ever observe the oil up near the top of the glass or above the top of the glass?

A I observed that on 18 at that particular time.

Q In that case what would happen?

A Well, the oil was going over into the gas line at that particular time.

Q BY THE COURT: What caused that?

A The well was making a head and the valve stuck and didn't open.

Q BY MR. WESTALL: Did you ever have any other experience with any other Trumble traps on the Union Oil Company property, and, if so, on what lease?

A Well, we had five, I believe it was, at Montebello on the Merced lease, and a few at Santa Maria, and some in the Valley at different places.

Q Did you have an opportunity to observe the operation of the traps last referred to?

A In November, 1918, I went over the lease at Montebello and found that very little gas was going

(Testimony of Ira B. Funk.)

into the gas line. Most of it was going through the oil lines into the tanks. The superintendent at that time said that it was impossible—

MR. F. S. LYON: We object to what the superintendent said.

Q BY THE COURT: What did he say?

A That at that time it was impossible to secure gas enough for our own operations, and very shortly after that we put a man on there to keep the valves free, to keep the traps in operation so we could furnish gas for the lease.

Q BY MR. WESTALL: Did you ever have an opportunity to observe the gas traps at Chapman Wells Nos. 1 and 2 and 5 of the Union Oil Company?

A I have of 1 and 2, but I don't know as I ever saw any oil go through No. 5.

Q No. 5 was not used, was it, that is, not very much?

A Well, if it was it was only a few days, but I have no knowledge of it.

Q When did you observe the operation of traps on Chapman Wells No. 1 and No. 2?

A I observed the first traps put in on Chapman immediately after they were installed, and a number of times afterwards, and then I observed the traps that were put in say along in August, 1919. We had two high pressure traps put in at that time.

Q. At the time that you first observed the Trumble gas traps at the Chapman No. 1 and No. 2 wells,

(Testimony of Ira B. Funk.)

please explain how they operated, particularly as regards the oil level.

MR. F. S. LYON: We object on the ground that the witness is not qualified. I may have observed them or I may have walked by there, but I wouldn't be competent. This witness had no charge of those traps, and I don't think he will so testify.

Q BY THE COURT: State what observation you made as to the character of them, first.

A At that time my work was special work and special problems, and this well seemed to be a special problem. It was a very large well and it was up to me to keep track of the quantity of gas by having it measured at stated intervals and by having it tested for gasoline content. The first two traps were of light construction and were not used very long, and the well sanded up or was off production for possibly two months. When it came back on production it was very large and had a large amount of sand flowing in, and we cut out the traps. So later on we decided to put in the heavier traps and they were installed. The well at one time made around eleven million cubic feet of gas per day. It was necessary to have this gas as clean as possible before going into the Industrial Fuel Supply Company's lines, and we had to put on drips on the gas line to handle a considerable amount of oil as that oil would vary. At the time the well made the greatest amount of gas the oil production was down around say probably 2500 barrels a day, and at the maximum production I think

(Testimony of Ira B. Funk.)
the gas production was around six or seven million feet per day. We also installed a vertical separator, as you might call it, on the oil line, to eliminate gases being discharged from the oil into the production tank because the gases from the oil were quite rich and heavy and would hang down around the tanks, especially during a foggy night, and it was quite dangerous. When this gas was separated it was carried off and burned in a torch, and I believe at one time we used some of it under some boilers. As I recall it, our principal effort was to keep the outlet valve sealed and to keep the oil as low as possible. I know I noticed that a number of times. Then when we put in the high pressure traps they had a very long gage glass on them, but we didn't keep that size and the traps were tapped and we put in two gage glasses instead of using the one long one, and I know that several times I have been there and the oil would be showing in both gage glasses at the same time, that is, the gage glass lapped by and made two gage glasses. I never measured the height of them.

Q BY MR. WESTALL: Did you endeavor to maintain any particular level in those traps, and, if so, what level was maintained?

MR. F. S. LYON: We object on the ground that the question assumes a fact not testified to by the witness. The witness may have qualified to testify something about what levels were maintained, but he hasn't yet testified that he was in charge or maintained any levels in any of these traps.

(Testimony of Ira B. Funk.)

Q BY THE COURT: Were you there constantly during that period?

A When the well first came in I was out there practically every other day.

Q How long did that continue?

A The first week when the well came in I was out there about every other day and sometimes in between that. Then the well went off production, and when it came on again I would be out there two or three times a week for quite a while.

Q For about how long?

A Well, that was over a period of possibly four months.

Q And did you observe at that time the oil level?

A I just observed the general operation. I had nothing to do with maintaining the well. Mr. Morgan had charge of that work, but probably whenever I would go around the traps I would see that level.

Q You may state what you saw.

A The level was at such a point that the oil could be seen in both gage glasses practically all the time I was around it. I don't know as I ever saw the lower gage glass entirely full. I don't recall it.

Q BY MR. WESTALL: The gage glasses overlapped, didn't they, so that the upper gage glass would extend below the top of the lower gage glass?

A Yes, sir.

Q So that the oil might not be at the top of the lower gage glass?

A Yes.

(Testimony of Ira B. Funk.)

Q Was there any difficulty, to your knowledge, during the time that you had an opportunity of observing those traps, with the oil going over into the gas line?

A Well, as I say, we had to maintain a drip on there at the traps to take care of the oil spray that carried over.

Q. What, if any, apparatus did you use on the oil line to aid in the separation?

A I spoke of the vertical separator, which was a shell about four feet in diameter and possibly fourteen feet high. The oil was turned into this, and it had a riser pipe connected to the bottom and ran up possiblv six or eight feet to give it pressure on this shell, and the gases from this were taken off and burned in a torch and possibly at one time burned under a boiler.

Q BY THE COURT: That was to take the gas out and not the sand?

A That was to take the gas out. We had a sand separator in ahead of the traps before the gas and oil came to the trap, a vertical shell possibly two feet in diameter and possibly twelve or fourteen feet high. The oil was conducted into this shell and directed downward, and the sand drawn off at the bottom and the oil and gas off at the top.

Q BY MR. WESTALL: What, if any, trouble did the sand cause in the operation of the valves?

A It cut out the valves.

(Testimony of Ira B. Funk.)

Q And could the trap be relied upon to operate automatically during the time that you were being troubled with sand?

A Well, it was necessary to keep men there during the maximum flow at all hours to be able to shift from one trap to the other on account of the sand cutting out the valves.

Q. You have spoken, I believe, of having seen the operation of Chapman No. 5.

A No, I didn't.

Q You never saw it in operation?

A. No, I didn't.

Q. What did you understand was the purpose and function of the gage glass?

A To determine the oil level. A gage glass is usually considered as a means of determining the level of a liquid in a glass container.

Q Could you also observe the level of the oil by noting the position of the float arm on the outside of the trap?

A No, sir.

Q Why not?

A Because they are not all the same angle. On some of those traps with the float arm the indication might be thirty degrees off of horizontal and still you might have the gage glass half full, or you might barely have oil in the gage glass and the float arm horizontal. The float arm outside of the trap is not an indication because those pins are not tight and they are not all drilled true.

(Testimony of Ira B. Funk.)

Q. So that the fact that an arm extending out of the trap was in a horizontal position would not indicate where the float was?

MR. F. S. LYON: We object to that as leading and suggestive, and argumentative.

THE COURT: He has already answered it, I think.

MR. WESTALL: I think he has, too.

Q Do you know how far the float extended down in the oil upon those traps? Did it rest upon the top of the oil?

MR. F. S. LYON: What trap?

MR. WESTALL: On any of the traps at Hole 6 or 18, or Chapman 1 or 2, about which he has testified.

A. No. I never made a test of that, that I recall. Naturally the float would be submerged the greater portion of its volume.

Q. Do you remember whether or not on any of the traps that I have last referred to there were any counterweights on the float arm that extended outside of the trap?

A I think at various times most all of the traps have had counter weights at one time or the other, depending on the amount of sand in the oil and the volume going through.

Q What was the purpose and effect of those counterweights on the float arm or on the mechanism connected therewith, so far as submergence or lack of submergence of the float was concerned?

(Testimony of Ira B. Funk.)

A Well, the weights would tend to pull the float out of the oil and raise the level. As a matter of fact, as I recall, the weights were added more as a safety measure to help the value open to keep the oil from going over into the gas line; in other words, if the valve would stick in a closed position and the float would become entirely submerged there would be no more buoyancy to the float and consequently the only way to assist would be to put a weight on the outside without putting a larger float in.

Q I wish you would state whether it would be possible to operate a gas trap with the float normally submerged beneath the oil level.

MR. F. S. LYON: That is objected to as leading and suggestive, and purely hypothetical, and immaterial.

THE COURT: Just what do you mean by that question, Mr. Westall, by "normally submerged"? Do you mean in what position the valve would be?

MR. WESTALL: That would be for the witness to answer.

THE COURT: I can't understand it. Perhaps he can.

MR. WESTALL: Here is the point: It was testified that during the time they were maintaining a certain level in the trap, testified on behalf of the defendant, the normal operation was to have that ball submerged below the oil level.

THE COURT: Do you mean that its own weight would submerge it?

(Testimony of Ira B. Funk.)

MR. WESTALL: I mean the way the trap was operated is that it wasn't intended to rest on top of the oil but it was intended to normally function beneath the surface of the oil.

MR. F. S. LYON: I would like to have you point that testimony out. I can't agree with you in that statement.

MR. WESTALL: Well, if counsel will say that they never contended that that was the operation, that will be all that there will be to it.

MR. F. S. LYON: Show us what you refer to.

MR. WESTALL: I couldn't point the page out at the present time, but that is my recollection of the testimony, that there is testimony to that effect, just the same as there is testimony that the normal oil level was above the top of the gage glass and the gage glass had no function.

THE COURT: I may not understand it rightly, but my understanding is that in order to *life* the float the float would submerge as the oil rose to some extent before it attained sufficient lifting power to open the valve, and in reverse direction as it dropped back naturally it would become unsubmerged as the oil level receded to down to the lowest point, and finally rest on top of the oil; that invariably to some extent it would be submerged as it lifted. How much I don't know.

MR. WESTALL: By submergence I mean—

THE COURT: You speak of "normal operation," and I can't get what you mean by normal operation

(Testimony of Ira B. Funk.)

there. Is the valve lifting or is it at the lowest point that it will go; in other words, is the valve closed or is it being opened or is it clear open?

MR. WESTALL: The float is designed to take care of a certain range of fluctuations in level. Now the purport of the testimony I referred to was that during all of that range of movement up and down that float was submerged and did not rest on top of the oil.

THE COURT: Will you read the question, please?

(Question read.)

Q BY THE COURT: What do you understand by that question, Mr. Funk?

A I presume he means would it be possible to open the valve if the valve were not open and the float were submerged; if the valve would have any more lifting power if submerged than being partially submerged.

MR. WESTALL: That is substantially it.

A After the float is submerged the only increased capacity is due to the density of material, by depth.

Q. BY THE COURT: Do you mean after it is complete submerged?

A Yes, sir.

Q Until it is completely submerged every added inch of submergence adds to its lifting power?

A Yes, sir.

Q You think after it is once completely submerged that the addition of the liquid above it does not increase its power; is that your idea?

(Testimony of Ira B. Funk.)

A It is so small that it couldn't be weighed in the ordinary gas trap.

THE COURT: Does that answer your question?

MR. WESTALL: That answers the question very thoroughly.

Q How long have you known Mr. David G. Lorraine, the plaintiff in this case?

A I met him first in May, 1919.

Q Did Mr. Lorraine ever disclose to you an invention in gas traps?

A Yes, sir.

Q Please state when that was.

A It was at that time, in May, 1919.

Q Please describe what he disclosed to you in May, 1919.

Q BY THE COURT: Did you say 1919 or 1918?

A May, 1919. He had two sheets of drawings on white paper. The drawings were in ink, and he showed me a cross-section and I think two vertical elevations of a gas trap. Also one sheet, I think, had some details of valve mechanisms on it. The sheets were, I would say, about twenty by thirty in dimension.

Q BY MR. WESTALL: At the time he showed those drawings to you, Mr. Funk, did Mr. Lorraine explain the construction of the device and the use and purpose of the different parts illustrated in the drawings?

A Yes, sir.

(Thereupon a recess was had until 2:15 o'clock p. m.)

(Testimony of Harry W. Vanderveer.)

AFTERNOON SESSION.

2:45 o'clock.

THE COURT: You may proceed, gentlemen.

MR. WESTALL: If the court please, I have a very short witness, just to identify a drawing.

THE COURT: You may call him.

HARRY W. VANDERVEER,

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESTALL:

Q Please state your name.

A Harry W. Vanderveer.

Q Where do you reside?

A 129 West Avenue 28, Los Angeles.

Q What is your employment?

A Draftsman for the Llewellyn Iron Works.

Q How long have you been so employed as draftsman for the Llewellyn Iron Works?

A About fifteen years.

Q Do you remember whether or not the Llewellyin Iron Works ever made a gas trap for David G. Lorraine?

A Yes, sir.

Q Will you please look at the blueprint I show you and state whether you have ever seen that be-

(Testimony of Harry W. Vanderveer.)

fore, and if so under what circumstances (handing same to witness)?

A Yes; it is the assembly drawing of the plans that we made up for him, and I checked it with my initials on there as having checked that drawing and the corresponding details of it.

Q And when was the drawing made?

A The drawing was made and completed and I checked the completion of it on the date on there—12/3/19.

Q That is December 3, 1919.

A Yes, sir.

Q And do you know where this blueprint came from?

A No, I don't know where the blueprint came from; but that is a print from the tracing in our office.

MR. WESTALL: We offer in evidence the blueprint identified by the witness as Plaintiff's Exhibit No. 34.

MR. F. S. LYON: In order to save time, I suppose you will admit, in order to avoid objection, that this is the print of the trap that was put on the Tonner lease that has been referred to and the one that was enjoined in the other suit.

MR. WESTALL: Well, I don't know anything about that, Mr. Lyon, and I do not believe it is in any way pertinent to this case.

MR. F. S. LYON: This is the one Mr. Lorraine testified was put on the Tonner lease, is it not?

(Testimony of Harry W. Vanderveer.)

MR. WESTALL: I do not believe it is. I don't know.

Q Please look at the paper I now show you, and I ask you whether you recognize what it is.

A It is the form the salesman used at the Llewellyn Iron Works for writing up their original sales orders, which is sent in to the order department, and they copy it and send to the engineering department a copy of this sales order.

Q Is that the original order? Do you recognize that handwriting?

A Yes, the handwriting is that of Mr. Reynolds, the salesman. It also has his initials on it, and carries our order number.

Q And the order will correspond with the order number on that blueprint?

A It corresponds with the number on that blueprint, yes.

MR. WESTALL: We offer the document in evidence as Plaintiff's Exhibit 35.

Q. Do you know whether the gas trap mentioned and described in the two exhibits last referred to—the blueprint and the slip Plaintiff's Exhibit 35—was ever made by the Llewellyn Iron Works?

A Yes, sir, it was.

MR. WESTALL: That is all.

(No cross-examination.)

(Testimony of Ira B. Funk.)

IRA B. FUNK, recalled.

DIRECT EXAMINATION resumed

BY MR. WESTALL: Q Mr. Funk, you were referring before the last adjournment to certain disclosures that were made to you and a certain drawing exhibited to you by Mr. David G. Lorraine. When was that disclosure made and drawing exhibited to you?

A In May, 1919.

Q Now please state what Mr. Lorraine explained to you at the time he exhibited the drawing referred to to you.

A Well, the drawing showed up pretty well what it was intended for, and it was not necessary to explain it, except when I made objections to certain features.

Q Please describe the device that was illustrated in the drawing as you recall it now.

A It had a cylindrical shell in a verical position with a partition on one side which would be about one-third of the diameter of the shell from the outside wall. This partition came almost to the top, and I have forgotten just—well, from one-fourth to one-third of the length of the shell from the bottom. Above this partition was a little baffle, and a pipe introduced the oil from the top. The oil impinged on this baffle and then would strike the side wall—or part of it would—and drop in the small compartment composed by the vertical partition and the outside

(Testimony of Ira B. Funk.)

shell. On the opposite side, or in the larger compartment, was attached—on the outside was attached a valve for discharging the oil; then up nearer the top was a valve for discharging the gas. This was connected to a pipe on the inside of the shell, which pipe was approximately vertical and within a few inches of the top of the shell. He had two vertical cylindrical floats fastened together and two lever arms—one lever arm operating the oil outlet and one the gas outlet valve, the whole valve mechanism working in unison. I believe there was a provision in the bottom for drainage also—for draining water or sand.

Then the detail drawing showed details of a rotary valve mechanism which was supposed to be the type of valves used on the trap.

Q Is that all?

A Yes, sir.

Q. Was there anything peculiar or particular about the disclosure at that time that impressed these different features you have described upon your memory?

A Well, on account of some trouble we had, I examined it very closely, because we were very much interested in gas traps. The feature that brought it to my attention more noticeably than any other was the height to which it carried the oil. We had had trouble with the traps foaming over, and I objected to the height of the oil on that account, but he claimed that this trap would not foam as the oil was directed downwardly and the greater portion of the foam would be in the small compartment where the oil is

(Testimony of Ira B. Funk.)
flowing down, and that the oil striking the foam would break it up. I believe he claimed certain other features. And he also stated that in addition to that another means or safety method which was of value especially on vacuum lines was the outlet valve which would close as the oil level rose.

Q BY MR. F. S. LYON: You mean the gas outlet valve?

A The gas outlet valve; yes, sir.

Q BY MR. WESTALL: Were you familiar with the art of gas traps prior to that disclosure in May, 1919?

A Oh, I was familiar with the Stark trap, and modified forms of that same type of trap; the Oil Well Supply trap; and a trap that the Union Oil Company made up for themselves, which was a modification of the Oil Well Supply trap; and also the so-called derrick traps; and the McLaughlin traps.

Q What was the state of the art with regard to the maintenance of a high oil level in those old traps, if you know?

MR. F. S. LYON: We object to that question as not the best evidence and as calling for a conclusion of the witness only, and not the proper method of proof.

THE COURT: The objection is sustained on the ground that it would be a conclusion. He would have to interpret what is meant by the state of the art, and we do not know that he could do that.

(Testimony of Ira B. Funk.)

Q BY MR. WESTALL: Please describe what the practice was, if you know, in those early traps, towards maintaining a high oil level in the traps.

MR. F. S. LYON: We object to that upon the same grounds. That calls for a mere conclusion. Even the construction of the trap is not before the court.

THE COURT: You mean the early Trumble traps?

MR. WESTALL: No; I am speaking of traps generally prior to the Lorraine invention.

MR. F. S. LYON: And we object further on the ground that it is not rebuttal of any particular evidence; that it is part of the plaintiff's case in chief if he wants to prove invention. We have not referred to the Stark trap nor to the Oil Well Supply Company trap nor to the Union Oil Company's modification of the Oil Well Supply Company's trap, nor to the McLaughlin trap, as part of our defense, and if this evidence is germane to anything it is part of the plaintiff's prima facie case and cannot be rebuttal in any sense.

MR. WESTALL: I don't think so, your Honor, because it is the same without question. The introduction of the patent itself is sufficient prima facie evidence of invention, and when an invention and its advantages and its utility are attacked it seems to me proper rebuttal to refer to them.

THE COURT: He may state if he knows what the practice was regarding the height of the oil level

(Testimony of Ira B. Funk.)

on different traps, stating which ones they are, prior to this time.

MR. F. S. LYON: Note an exception.

THE COURT: That calls for actual knowledge, of course.

A The Oil Well Supply trap as manufactured by the Oil Well Supply Company would maintain a level from one-fourth to one-third the vertical height of the trap. The McLaughlin trap carried very little oil in it, but that was also a fairly low pressure trap, not a high pressure trap. The Stark trap carried an oil level which was variable; in fact it was so variable, not automatically controlled, it was replaced by other types of traps in a great many places. Then there were some modifications of the Stark trap which did attempt to maintain a certain amount of oil so that the gas would not blow through. In the derrick trap the oil level might be anything from one to fifty feet high, but the trap itself is usually eight or nine feet high.

MR. F. S. LYON: Without further explanation of the construction of those various traps, we move to strike the testimony from the record and to exclude it on the ground that it is a mere conclusion and not a statement of fact, and not rebuttal; also as immaterial, particularly unless it is shown that it works upon the same principle and mode of operation as either the Trumble trap or the Lorraine trap.

THE COURT: Yes; that would have to be shown. Otherwise there would be no basis for comparison.

(Testimony of Ira B. Funk.)
The difference between a float trap and a straight piece of pipe must be—

MR. F. S. LYON: I don't know whether your Honor is familiar with it or not, but the Stark trap is a straight piece of pipe trap, as far as that is concerned.

THE COURT: I think some similarity of principles of operation must be shown, otherwise there is nothing to compare it with.

MR. WESTALL: Exception.

Q Now regarding the high oil level, what advantages, other than the advantage of maintaining a seal of the oil outlet, did a high oil level in the trap have?

THE COURT: You refer now to a float type trap, do you?

MR. WESTALL: Yes.

MR. F. S. LYON: We object to that on the ground that it is not rebuttal, and is indefinite and uncertain, what counsel means by the term "high oil level," and it will be equally uncertain and unintelligible what the witness refers to.

THE COURT: Well, that part of the question is perhaps objectionable, as to what you mean by high. The witness may fix it if he can.

MR. F. S. LYON: It is part of their prima facie case to prove the utility. They went into that matter, and now this is purely cumulative. It is the same question we had yesterday morning.

THE COURT: It is the same question, but Mr. Westall stated that there are other things than the

(Testimony of Ira B. Funk.)

sealing and the blowing off features that he wanted to show were advantageous, and I retracted my ruling to that extent, as to those other features. There is no dispute here but what a reasonably high oil level, in order to preserve the sealing effect on the one hand, and not too high for it to blow off on the other, is advisable. There is no dispute between you on that question. Now Mr. Westall says there are other advantages which he claims, one of which is to facilitate the settling, and those matters I will permit him to show if he can.

MR. F. S. LYON: Those he went into on his original case, your Honor.

THE COURT: He did to some extent, yes. Mr. Lorraine set out what advantages this patent had, and he defined several things in doing that. Now I am not clear as to whether or not he is entitled to that strictly as rebuttal, and I am resolving the doubt in his favor and will allow the testimony to be introduced, overruling the objection, if the witness can be asked a question he can understand with some precision so that we may understand just what he is taking into consideration.

MR. WESTALL: When we speak of a high oil level we mean a level above the vertical center of the receptacle.

MR. F. S. LYON: If your Honor please, I want to call your Honor's attention to something. It may have considerable weight on the form of this question and upon the particular inquiry. There is on file here

(Testimony of Ira B. Funk.)

a bill of particulars, and one of those particulars is this: In our motion for bill of particulars we ask that the plaintiff point out precisely what plaintiff asserts or claims is new and patentable in each of the claims of the reissue patent in suit charged to be infringed. Now in answering and filing the plaintiff's bill of particulars we find specification 3: "That plaintiff asserts that the novel feature set forth in each of said claims is an oil and gas separator arranged for maintaining the oil level above the vertical center of the separator by means of a float operating in the upper portion of said receptacle and controlling the oil discharge." Now it seems to me if any question is going to be asked in regard to any level whatever having any advantage it must be in that combination and the level denominated in that bill of particulars.

THE COURT: I think the question is substantially that now.

MR. WESTALL: In regard to that bill of particulars, your Honor, I would state that I was not in the case when that bill of particulars was filed; if I had the making of it on a question of that kind I would simply state a conclusion of law. The novel thing is the combination of elements contained in any patent claim. That is basic elementary patent law. And this bill of particulars should not override the patent law, whatever it happens to say or whatever happens to be the assertion here. Now there is a law on that, that your

(Testimony of Ira B. Funk.)
Honor will find that it is presumed, as a matter of law, that each separate element is old, except in the combination in which it is found. And so why attempt to point out a novel element and then set aside the claims and confine the charge of infringement and anticipation to this particular novelty that was pointed out and thus override the law and the manifest intent of the document as defined by law? Of course that is immaterial, but that is the way the matter stands so far as that bill of particulars is concerned.

THE COURT: He may answer. The objection is overruled.

MR. F. S. LYON: Exception.

Q BY THE COURT: What advantages are there in having the oil level above the vertical center of the trap?

A The larger the volume of oil contained the greater the time element for settling either sand or water in a trap. Below a certain critical velocity the sand and water will precipitate quite rapidly out of oils that are not too viscous and not of too low gravity; and from the critical velocity on down to the lower velocities they are more easy of separation.

Q BY MR. WESTALL: Have you recently visited the wells about which you testified, namely, the Union Oil Company's wells, Chapman Nos. 1 and 2, and the Hole Nos. 6 and 18?

A Yes, sir.

Q When did you last visit those wells?

(Testimony of Ira B. Funk.)

A On May 4.

Q And under what circumstances and for what purposes.

A To observe them.

Q Who was with you at the time you made that last examination?

A Mr. Lorraine and Mr. Westall and a photographer, and another gentleman sitting over there.

Q Mr. Prout?

A Mr. Prout.

Q And what happened at those various wells I have mentioned with regard to observation?

A On the Hole 6 there was no gage glass; there was no oil in the upper gage glass connection, and no oil in the lower gage glass connection.

Q In the Trumble traps about which you have testified?

A Yes, sir. On Hole 18 it was about the middle of the gage glass, or about on a line with the bottom of the manhole plate. On the No. 1 Chapman the oil was not visible in the second gage glass, but oil and gas would come out of the pet-cock at the bottom of the gage glass fitting—that is, on the second gage glass fitting. I presume it would be about eight inches in the lower gage glass. In the Chapman No. 2 there was no oil in either one of the gage glasses, and judging from a light sprav of oil that would come with the gas out of the pet-cock of the lower gage glass fitting the oil level must have been verv close tc that point.

(Testimony of Ira B. Funk.)

Q I show you a photograph and ask you if you can identify the subject-matter of that photograph.

A That is the trap at Chapman No. 2.

Q About which you have just testified.

MR. WESTALL: We offer in evidence the photograph identified by the witness as Plaintiffs' Exhibit No. 36.

Q. I show you another photograph and ask you if you can state what that represents.

A That is the trap at Chapman No. 1.

A All of these being the traps you have just testified about, on the Union Oil Company's property. The last traps, Chapman Nos. 1 and 2, are both high pressure; they were special traps.

MR. WESTALL: We offer in evidence the last photograph identified by the witness as Plaintiff's Exhibit No. 37.

Q I show you another photograph and ask you if you can state what that represents.

A That is the shell which the oil from Chapman No. 1 was passed thorugh to eliminate gas and vapors from the run-down tanks.

MR. WESTALL: We offer the last photograph in evidence as Plaintiff's Exhibit No. 38.

Q I show you another photograph and ask you if you can state what that represents.

A That shows the trap at Hole 18 of the Union Oil Company.

MR. WESTALL: We offer that in evidence as Plaintiff's Exhibit No. 39.

(Testimony of Ira B. Funk.)

Q I show you another photograph and ask you to state what that represents.

A That is the trap at Hole 6 of the Union Oil Company.

MR. WESTALL: We offer the photograph last identified by the witness as Plaintiff's Exhibit No. 40.

That is all.

CROSS EXAMINATION

BY MR. F. S. LYON:

Q Who took these photographs which have been last offered in evidence and identified by you?

A I don't know his name. He was a photographer.

Q Were they taken under your direction?

A No, sir.

Q Which one of these traps was in actual operation and the well on production at that time?

A They were all in operation.

Q And they show what condition of the trap?

A What do you mean by "what condition"?

Q Normal? I believe you used that term in your testimony.

A Well, the trap was operating, yes.

Q On the Hole No. 6 trap how much oil was the well producing at the time this photograph was taken?

A I don't know.

Q Do you know what gas, if any, it was making at that time?

A No, but I know it was going through. I could hear it.

(Testimony of Ira B. Funk.)

Q Did you make any effort by movement of the lever arm to determine the level of the oil?

A You cannot tell it by the level of the arm.

Q You cannot?

A No.

Q Did you make any effort to try it in that manner?

A I did on other traps.

Q Did you on that trap, then?

A No, sir.

Q What is your connection with this case?

A Nothing whatever except as a witness.

Q As an expert witness for pay?

A No; I was subpoenaed.

Q You will swear positively that you are not a paid witness in this case?

A The company told me that I could not go on as an expert witness.

Q Oh, you were subpoenaed because the company objects to its employes going on as expert witnesses; is that it?

A They don't want them to go on as expert witnesses.

Q Now isn't that the only reason why you are not a paid witness in this case, and you are voluntarily here except for the fact that your company objects to your being here?

A No, sir.

MR. WESTALL: We object to the question as to whether that is the only reason. The reason the wit-

(Testimony of Ira B. Funk.)

ness is called as he is is partly because we called him that way. He is not qualified to state what reason.

Q BY THE COURT: Are you to receive any special consideration from the plaintiff?

A Not that I know of. No arrangements have been made.

Q BY MR. F. S. LYON: Have you testified in this case before?

A Yes, sir.

Q Were you paid for your time as a witness on this case before?

A Yes, sir.

Q How much?

A $25.

Q And you were present how long?

A One day.

Q You expect to receive the same amount, $25 a day, for your time in this case; isn't that true?

A No, sir; I have been trying to get away every day.

Q Well, answer my question. Isn't that your understanding?

A No, sir; there is no understanding; absolutely not.

Q You don't expect it?

A I don't know what they will do. If anything, it is rather a donation.

Q Now please tell us exactly what trouble. so far as you now remember, there was had, to your knowl-

(Testimony of Ira B. Funk.)
edge, with the Trumble traps on the Hole lease in 1918 or 1919.

A When I went there in October, 1918, the first thing I was supposed to do was to get as much gas through the refinery as it was possible to get through, and several of the traps were blowing gas out with the oil, and I took it up with the lease foreman and he didn't want the traps touched on the start. I finally persuaded him to let me do some work on them.

Q Now have you any personal knowledge of what that trouble was? If so, give it to us.

A I was right there.

Q Well, what was it?

A The oil went over into the gas, and the gas was blowing out with the oil—

Q What was the reason for that?

A There were two reasons: one was, in one case, the oil valve was cut out; the other was that the valve would stick and hang up.

Q Now at this prior hearing on June 12, 1923, you were asked the following question in regard to these same traps, at page 51: "Q—BY MR. WESTALL: Now what was the specific trouble that you had with those various traps?" And your answer was: "The mechanism for operating the valve was rather poorly constructed and would bind and prevent the float from operating the valve, the float being too small, and not having power enough to overcome the resistance in the transmitting mechanism. The valves were a balance valve of the piston type and they would cut out

(Testimony of Ira B. Funk.)
with the sand, and when they would cut the least little bit the sand would work in between the valve and the —between the movable part of the valve and the rings, causing them to bind and stick. Then if the valves stuck in a closed position the trap would fill up and the oil go over into the gas line. If it stuck in an open position the gas was blown out, not only from that trap but from other wells connected on the gas line, because there was no check valves on the trap to prevent it from going back." Isn't that a correct statement of your testimony as given at that time?

A That simply gives all the details.

Q And that is the testimony you gave at that time, is it?

A Yes, sir.

Q You were further asked at that time: "What was done when you had that trouble with the valves—did you have valves sticking or cut out? What did you do to remedy that?" That is a question by Mr. Westall following the question and answer I have just read. And your answer was: "On the La Merced lease at Montebello it was necessary to put a man on to work the valves, to go around every few hours and work them to get the sand out so that they would work freely, and even then at times some of them would stick open. On some of the other leases where sand trouble was not encountered it was found necessary to go around and oil up the mechanism and work it over at frequent intervals. That was usually done

(Testimony of Ira B. Funk.)

about once a week." That was your testimony as given at that time, was it?

A Yes, sir; that is correct.

Q On the same day, on further direct examination, you were asked at page 54 of the reporter's transcript about Mr. Lorraine explaining an invention of a gas trap to you. Where was that explanation made to you?

A On the McLeod lease at Taft.

Q And you were asked this question: "Please state what he explained to you at the time he showed you this drawing. A—He had a drawing of a trap consisting of a vertical cylindrical shell with a partition from the top to a point about one-third of the length of the shell from the bottom. This partition divided the shell into two parts, and I should judge the cross-sectional area of one would be about one-third of the total area of the shell. In this smaller section the oil was conducted downwardly and the gas was permitted to rise to the top and was taken off. Just how it was taken off I don't remember. The drawing showed two valves—one on the gas line and one on the oil line—controlled by a vertical cylindrical float well up in the shell. I made some objections to this type of construction on account of carrying the oil so high that I thought it possible for the oil to be carried over into the oil line. He further explained and stated that the gas valve would prevent this, as the gas valve would be closed when the float was raised; and he further explained that the objection I raised to the

(Testimony of Ira B. Funk.)
trap foaming was overcome by the fact that the oil was separated from the gas in a separate compartment and the foam would be broken by the impact of the oil dropping down on the foam. The question of sand cutting out the valve was also discussed, and he pointed out the fact that the rotary type valve as he had it designed would permit the sand to go through without causing the valve to bind." Is that your testimony?

A Yes, sir, that is my testimony, and substantially what I have just testified.

Q In what manner did Mr. Lorraine at that time state the foaming was overcome by the fact that the oil was separated from the gas in a separate compartment and the foam would be broken up by the impact of the oil dropping down on the foam? Please explain what you meant by that answer.

A Well, the foam would naturally form when the gas is first being liberated—

Q Liberated into the trap, you mean?

A Liberated into the trap; and that would naturally be in that compartment, and the weight of the oil or the spray of the oil coming down on it would have a tendency to break it up. That is the way it was explained to me.

Q Then Mr. Lorraine explained to you, did he, that the level of oil at all times, or of oil and water, would be maintained so that the lower end of this vertical partition was within the liquid, so that a seal

(Testimony of Ira B. Funk.)

was maintained and there couldn't be a passage of gas around under the bottom of that vertical partition?

A That is the way I understood it, yes.

Q And that the impact of the incoming stream of gas and oil, or foam, would have to strike on the top of a body of liquid before it could pass into the separation chamber on the other side of this vertical partition?

A Yes, sir. That is the way I understood it.

Q And at that time Mr. Lorraine particularly explained to you the feature of advantage of the synchronized or simultaneous operation of the oil-outlet and gas-outlet valves by the movement upward and downward of the float?

A Yes, sir.

Q You have in your testimony here today answered a question or questions in regard to a high oil level. Now assuming that the point of outlet of the oil from a cylindrical chamber is at a given point, to wit, eight feet from the bottom of that chamber, how high an oil level must you maintain in order to seal that outlet?

A Just enough to cover it, unless there is a turbulence.

Q Then is it not true that the question of oil level depends upon the point of outlet of the oil?

A Not necessarily.

Q It has no relation to it whatever?

A Well, your outlet may be submerged eight feet. But you would not want it at the bottom of the trap.

(Testimony of Ira B. Funk.)

Q How would you keep your oil outlet submerged eight feet in one of these traps if your flow of oil into the trap was constant?

A By the position of the float, the location of the float in the shell. If your float is located up approximately eight feet, and operated the valve, would you have the valve eight feet or twenty feet below the float?

Q Wouldn't your outlet and inlet of oil necessarily be the same if the float was actuated automatically?

A How do you mean the same?

MR. F. S. LYON: Read the question.

Q Your outlet and inlet, in volume, would be the same, if your float automatically controls the outlet valve.

A Yes. It would flow the same. The same amount would flow through.

Q Now if the same amount is flowing through at all times, the same amount flowing out that is flowing in, how do you explain that the given amount coming in will be longer in the trap?

A If you have a gallon measure and you feed the water in drop by drop it will take a long time to fill it, and emptying it drop by drop it will take a long time to empty it; or if you are taking it in drop by drop and letting it out drop by drop it will take a long time for the water to get through.

Q Now doesn't that have anything to do with the question of the construction and where the inlet and outlet are?

(Testimony of Ira B. Funk.)

A I don't quite get that question.

Q Well, you say in the Lorraine trap the inlet is in a separate, divided compartment at one side of the trap or shell.

A Yes.

Q And that the inlet oil comes down onto the body of liquid maintained at all times in that compartment below the vertical partition. That is correct, is it?

A Yes.

Q Now what oil is it that is flowing out of that trap when the valve is open sufficient only to allow the same amount of oil to flow out that is coming in?

A Well, it would be the oil on the opposite side of the partition that would be flowing out.

Q And it is oil which has been caused to go down through the body of liquid, around underneath the bottom of that partition, and is brought to a state of quiescence and then allowed to flow out the oil outlet; is that correct?

A Well, I wouldn't say it is absolutely quiet; but it does flow down under the partition and out.

Q Well, does it flow in a current or in a substantially quiescent manner?

A It would depend on the rate of flow.

Q And it also depends on that same rate of flow how much precipitation of sand is permitted, does it not?

A Well, if your velocity is above a foot and a quarter per second it would not precipitate very much; if it is below that there would be more precipitation.

(Testimony of Ira B. Funk.)

Q Well, now take it on the Chapman No. 1 when you first observed the operation of the Trumble trap thereon, what was the velocity per second of the oil through that trap?

A Well, I don't remember at the time. I know I calculated and designed a trap, which later we decided not to put in. But I know at the time the test was made it required a velocity of not in excess of a foot and a quarter per second to precipitate the sand.

Q Now what is vour best recollection of the velocity of that oil through that Trumble trap at that time?

A Well, it was pretty high. I don't know as I ever calculated it through that trap; in fact I know I did not.

Q Did you ever calculate the velocity of the oil through the Trumble trap on Hole No. 6?

A No, sir.

Q Do you know whether that was high or low?

A It never has been high to my knowledge.

Q Was that equal to a foot per second?

A No, I don't think so. I am just judging—or calculating. That well never made any sand to my knowledge.

Q Now these same traps that were there on the Hole property in 1919—I think you said you went there, didn't you?

A 1918.

Q In 1918—are still there in operation, are they not?

(Testimony of Ira B. Funk.)

A They have been shifted around some. You see, the two heavy traps were taken over to the Chapman, and I believe the two lighter traps we had also were taken back. I couldn't exactly say as to that, because they shifted those around so much. But the lighter ones are there.

Q And still in operation?

A Yes. That is 6, 13, 18, and probably one or two others.

Q And still in operation?

A Yes.

Q And the Union Oil Company are still using Trumble traps on the Chapman property, are they not?

A Yes, sir.

Q And on how many other properties?

A I guess we have Trumble traps on practically all of the properties.

Q Are the Trumble traps which you have referred to as being in the Taft field and in the other fields you have referred to still in use?

A Well, I haven't been there since 1920 to observe the traps. There were none of them in use at that time.

Q The wells were not producing—

A Well, the field department would not let you put the oil through the traps, and they wouldn't use the Trumble.

Q In other words, they didn't want any back pressure on the wells?

(Testimony of Ira B. Funk.)

A They didn't want any back pressure, and they were kicking about the sand.

Q Now assuming that you had a cylindrical trap say sixteen feet high and your oil level was carried eight feet high in that trap. Now without changing any other condition say you simply added an eight-foot extension to that trap at the top, without changing your float or valve outlets or otherwise; would that change in any way the manner or function of the sand settling out of the oil?

MR. WESTALL: We object to that as not cross-examination. It is very obviously cross-examination of an expert witness on the theory that he has gone into matters of expert opinion generally, which he has not, having expressly stated that he was not called as an expert.

THE COURT: Does the question not include an increase in oil depth?

MR. F. S. LYON: No. I am going to keep the oil at the same place, and everything else the same, except that I am going to put on eight feet more of shell at the top in order to make it an eight-foot higher gas chamber.

MR. WESTALL: This witness was not called to answer hypothetical questions as an expert; he was called as a fact witness to testify to certain facts within his knowledge; so obviously this is very grossly not cross-examination.

MR. F. S. LYON: He has been asked, over our objection, a number of questions about the oil level and

(Testimony of Ira B. Funk.)

about the advantages of maintaining an oil level at or above the mid-vertical center. Now those were the specific questions, and we have maintained always in this case that this question of the mid-vertical center has nothing to do with the operation of the trap, and I want to show it by his own testimony.

THE COURT: Let us see if the question reaches that point. The question was specifically the mid-vertical center, the advantages of having the oil there. Now counsel is taking it the other way around and saying suppose we have a height that will not throw the oil below the mid-vertical center, what would be the effect. He may answer.

A There would be no effect on the settlement.

Q BY MR. F. S. LYON: Would such an extension of the trap as indicated in the last question, other conditions remaining the same, detract from the efficiency of the trap as a separator?

A No, sir.

Q Would the mere extension of the shell of the trap upward, as indicated, have any effect upon the oil seal as maintained?

A No, sir.

Q Then is it not a fact, Mr. Funk, that if you had simply taken and extended the old Trumble traps on the Hole lease a few feet longer you could have carried your oil level that many additional inches or feet higher without the oil going over into the gas line as you have described in your testimony?

(Testimony of George Prout.)

A Well, you would have had to have reconstructed the inside of the trap.

Q You would simply have had to raise your baffles to the top and put them in relative position and simply extend the length of the trap that much, would you not?

A Yes, sir.

Q Then you would not have affected in that manner any of the locations of your oil outlet or your valve mechanism or your float mountings, would you?

A No, sir.

Q And you could have used the adjustments that were provided on those traps, could you not?

A Yes, sir.

MR. F. S. LYON: That is all.

MR. WESTALL: That is all.

GEORGE PROUT,

called as a witness on behalf of the Plaintiffs, in rebuttal, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESTALL:

Q Please state your name.

A George Prout.

Q Where do you reside, Mr. Prout?

A Down in Compton.

Q And what is your business?

(Testimony of George Prout.)

A Service salesman for the Lorraine Gas & Oil Separator Company.

Q How long have you been so employed?

A Since the middle of May, 1920.

Q During that time what have been your duties?

A My duties has been to give service to the separators in through the field wherever they need it, and sell the separators, and show how they were installed, and the proper way to pipe them.

Q During that time have you been familiar with the construction and mode of operation of the Trumble gas trap where in use?

A Yes, sir.

Q Are you familiar with the mode of operation of the Trumble gas traps such as you have heard testified about at Chapman No. 1 and Chapman No. 2?

A Well, I know how they work, yes; but I never worked around them. I know what their functions are supposed to do.

Q You understand the construction and mode of operation of those old Trumble traps?

A Yes, sir.

Q Have you had occasion during your employment from April, 1920, I believe you said, to examine or observe the operation of those old Trumble traps?

A Yes, sir.

Q How many of the old Trumble traps did you have an opportunity of thus observing?

A Oh, I would say I have observed every one in the field.

(Testimony of George Prout.)

Q And how many would that be, approximately?

A Well, between five and six hundred; maybe more and maybe less.

Q Did you ever observe the oil level in those old Trumble traps?

A Yes, sir.

Q And how did you make such observation?

A Well, whenever I would pass and see a Trumble trap I would look to see where they carried their oil level, and I would always find it about two inches in the glass. Once in a while I would find one where it was up four inches in the glass.

Q During your observation of all those traps did you ever observe any trap where the normal oil level was carried up above the top of the gage glass?

A Never one, no, sir. Whenever the oil went up above the top of the gage glass they was getting oil over into the gas line, at all times.

Q Have you recently made any special examination of any of these old Trumble traps with a view of testifying in this case?

A Yes, sir. On May 4 I went out with a party and we examined the traps.

Q Who was present with you at that time?

A Mr. Funk and Mr. Lorraine and yourself and myself and a photographer.

Q What was done on that occasion? Please describe that trap generally.

A Well, we drove out to the Hole lease, No. 18, and observed the separator and found that the oil was

(Testimony of George Prout.)

about up to the bottom of the manhole in the separator, and we took a photograph of the separator. Then we went from there up to Hole No. 6 and examined that separator— Oh, no, excuse me. When we first went to Hole 18 the gage glass was shut off on the separator, so we had to open the valves to find out where the oil level was in the separator, and the oil raised up then within—about the bottom of the manhole. Then we went up to Hole 18 and I myself opened the valve on the bottom of the gage glass cock, because the gage glass was broken out, and we got some oil out of there, but we couldn't get no oil out of the top cock of the gage glass; clear gas is all we got out of there. Then we went over to Hole No. 6, over to Chapman No. 1, and we found a separator over there on the Chapman No. 1—I forget the number now—I will refer to it and see (referring to pocket memorandum book). Trap No. 185 had two gage glasses on. Mr. Funk explained why that was. He said at one time—

MR. F. S. LYON: Wait a minute. We object to any statements of anybody else.

The Court: Yes; don't state what was said to you.

A There was two gage glasses on the separator, and we found that the oil was in the middle of the bottom gage glass, just up to the bottom of the top gage glass, but there was no oil in the top gage glass. That would make about seven inches of oil in the gage glass. Then we observed Well No. 2, trap No. 186 on Well No. 2, and the oil level in that trap we just barely de-

(Testimony of George Prout.)

termined with a few drips of oil coming out of the pet-cock on the bottom gage cock itself. It had no glass in it. And there was no oil in the top gage glass. That also had two glasses on.

Q BY MR. WESTALL: In other words, in the last trap you have referred to there was no oil showing even in the bottom of the gage glass?

A No oil showing in the bottom of the gage glass at all; no, sir.

Q The oil was somewhere below that, was it?

A Somewhere below that; yes, sir.

Q Can you give the numbers of the Trumble traps that you examined on Hole lease No. 6, Hole No. 18, Chapman No. 1 and Chapman No. 2 to which you have referred?

A On Hole No. 18 I examined trap 180. On Hole 6—I haven't got that one down. On Chapman No. 1 I examined trap No. 185; on Chapman No. 2 I examined trap No. 186.

Q I now show you Plaintiff's Exhibit No. 39 and ask you to identify it if you can.

A That is Hole 18, trap No. 180.

Q And is that the trap you observed the oil level in?

A Yes, sir; we observed the oil level in that trap just at the bottom of the manhole.

Q About the middle of the gage glass?

A About the middle of the gage glass.

Q Now referring to Plaintiff's Exhibit No. 40, what does that show (handing paper to witness)?

(Testimony of George Prout.)

A That shows the Hole 6 of the Union Oil Company, and that gage glass was broke out of that trap.

Q Can you tell what the number of that trap was? Do you remember the number?

A I don't remember the number of it, no. 169 you have marked there.

Q I now call your attention to Plaintiff's Exhibit No. 38 and ask you to explain what that is (handing to witness).

A That is the receiving chamber that the Union Oil Company put in to receive the oil that was passed through the Trumble trap to take the gas off the oil before it went into the shipping tanks, because there was so much gas went through the Trumble traps that they couldn't put it into the shipping tanks without blowing oil all over the field.

Q BY MR. F. S. LYON: Do you know anything about that from your own knowledge?

A Only from what the pumpers has talked to me about it.

MR. F. S. LYON: I move to strike that entire statement from the record as hearsay and incompetent.

THE COURT: It will be stricken out.

MR. WESTALL: I will ask the witness if he is familiar enough with the operation of devices used in connection with gas traps to state what the purpose of that device is, from his own experience and knowledge.

(Testimony of George Prout.)

MR. F. S. LYON: Unless that is simply to show that that kind of device is commonly used, we object to it. The witness has no knowledge as to this particular use. I am perfectly willing to stipulate that such a device is in common use and is commonly employed and is a common thing in all gas traps.

MR. WESTALL: I am asking him about the purpose of this particular thing here.

MR. F. S. LYON: We submit the objection unless counsel wants a stipulation.

THE COURT: If he has general knowledge of its use he may state it.

A Why, yes, there is general knowledge of it. They have on several occasions put on a receiving chamber. Either one separator or two separators. It will run the oil from one separator into the other separator before they put it into the shipping tank, to take the gas out of the oil.

Q BY MR. WESTALL: On those old Trumble traps?

A Yes, sir.

Q BY THE COURT: Is that common with all traps?

A It is not common with all, unless they have a low oil level and they have so much oil that it will not separate the gas properly. Then some of them run them on a tangent and some run them parallel.

Q Are there some traps that will operate without any of those precautionary devices to catch the fluid?

(Testimony of George Prout.)

A Yes, sir. I am not saying that all the Trumble traps has the device on.

Q Does that depend on the quantity of product or is it invariable regardless of the quantity of product?

A That depends on the quantity of product; yes, sir.

Q BY MR. WESTALL: I now show you Plaintiff's Exhibit No. 37 and ask you if you can state what that is (handing same to witness).

A That is Chapman No. 1. Separator 18 I believe is the number.

Q And where was the oil level in that trap?

A The oil level was just below the bottom gage cock, just in the center of the bottom glass. You couldn't get no oil in the bottom of the top gage glass at all.

Q I am now referring to Plaintiff's Exhibit 36 (handing same to witness). Please explain what that shows.

A This is a Chapman No. 2. It has two gage glasses on, and we examined the separator and could find no oil in the gage glass whatever, and when we opened the little trycock on the bottom of the gage glass cocks we got a little drip of oil, showing that the oil was right around the bottom gage cock.

Q Did you make any other trip through the oil fields with a view of observing other old Trumble traps?

(Testimony of George Prout.)

(Witness testifying by reference to pocket memorandum book.)

A Yes, sir. On April 27 we went out and examined some more separators. We examined one on the McGinley lease at Montebello; and we examined the St. Helens leases; we examined three separators on the McGinley lease; and we examined three on the St. Helens property at Montebello, and two on the Union Oil Company's lease at Montebello, and two on the General Petroleum Company's lease at Richfield. That day we was out we observed, as near as I can remember, about twenty-three or twenty-five separators.

Q And did you take any special notice of the oil level on those traps?

A Yes, sir.

Q Where did you find the oil level in all those traps?

A On the McGinley lease, on Well No. 2 I think it is, McGinley No. 2, trap No. 210, the oil level was about two and a half inches in the glass. On McGinley No. 15, trap 212, the oil level was just in the bottom of the gage glass. Trap two hundred and— Then there was another separator there that I haven't got the number. The oil was four inches in the gage glass, but it had no means of adjusting the floats at all.

Q And did you examine any others?

A Then we examined the St. Helens Riverside property at Montebello, Well No. 3, and we found that the gage glass there was broken and we could

(Testimony of George Prout.)

get oil out of the bottom of the gage cock, but we could get no oil out of the top of the gage cock. Well No. 7 at St. Helens had trap No. 606 on, and they used this separator as a gas scrubber for trap 680.

Q BY MR. F. S. LYON: Then it was not used at that time as a gas and oil separator?

A Yes, sir; it was separating the oil from the gas that came from trap 680. The gage glass was broken on that and we couldn't determine where the oil level was. There was no oil level in the bottom of the gage glass cock. Union Oil Company No. 5 at Montebello, trap No. 194, the oil in the gage glass was two and a half inches, and they had weights on the float lever arm. On General Petroleum Thompson No. 1—

Q BY MR. F. S. LYON: Was that 680 you just read?

A From the Union Oil Company?

Q Yes.

A No, sir, 194.

Q And 680 on the St. Helens?

A And 680 on the St. Helens.

Q And how high did you say the oil level was in that at that time?

A On 680?

Q Yes.

A I didn't say, because that is one of the high separators.

Q You didn't take the trouble to look at that?

A Well, the oil was up in the glass. General Petroleum Thompson No. 1, Richfield, trap 308: this

(Testimony of George Prout.)

separator had the gage glass broken out and we tested it and it showed no oil in the bottom of the gage glass, and it had inside valves and no means of adjusting the fluid level at all.

Those are all that I have any data on; but every one else we examined we found ran about the same.

Q BY MR. WESTALL: I now show you a series of photographs and ask you to take up each in turn and explain if you can what is shown therein.

MR. F. S. LYON: We object to that question as incompetent and no foundation laid. They have not shown the conditions under which the photographs were taken, the conditions of operation, or otherwise. As the Court probably is aware, photographs can be the most misleading things; in fact, instead of there being a presumption in their favor there may be a presumption against them. I don't know whether your Honor has ever followed this photographic question up, but if you wish an example in that I will use the same one I have used in court here a number of times, and that is the reason why I require, so far as the Court will let me, absolute proof as to the conditions on taking a photograph. I have a photograph of my house, and you will find that in the picture of that house our street number is on our window, and there is no brass sign visible in the photograph, although it is a large size photograph, on the street number plate. As a matter of fact the street number is cut out of a sheet of brass and hangs over the archway of the porch, and there is no number on the

(Testimony of George Prout.)

window at all. After having that brought to my attention in 1911 I have been suspicious of photographs, and I am still.

THE COURT: Q Were you present when these photographs were taken?

A Yes.

MR. WESTALL: If there is any presumption against photographs it operates just as heavily against defendants' photographs as against ours.

THE COURT: He says he was there when the photographs were taken.

Q You may examine them and state whether they correctly represent the scenes which they depict as you saw them then.

MR. F. S. LYON: And what the operation was at the time; whether the trap was actually in operation, or whether he knows whether it was in operation, or whether it was idle, and so forth.

THE COURT: Of course he is only testifying to the correctness of the photographs first. That is all you have asked him.

A This photograph was taken on McGinley No. 2, trap 210 if I remember right. We wrapped a piece of paper around the gage glass to show where the oil level on that separator was when we took the picture, because the glass was so dark and the sun was so bad—if you will remember, on that particular day there was no sun shining, and we couldn't get the view of the oil through that photograph.

Q Then you put this piece of paper on this gage glass for the purpose?

(Testimony of George Prout.)

A I wrapped that around there just at the top of the oil.

MR. F. S. LYON: We object to the photograph on the ground that it is a manufactured piece of evidence.

Q BY THE COURT: Did you measure the height of the oil level in this case?

A Yes, sir.

Q And what was it?

A Two inches and a half.

Q And this paper was placed at that point, two inches and a half?

A This paper was placed just where the oil showed in the glass; yes, sir.

Q BY MR. F. S. LYON: And what was the condition of the operation of the trap and well at the time?

A The well was flowing and the trap working satisfactorily.

Q What flow?

A Why, it was flowing oil, I expect.

Q How much oil?

A I didn't gage the tanks.

Q You don't know anything about the operation except that there was perhaps some oil flowing in and out?

A Yes.

Q How much gas did it make?

A That you don't know unless you are there every day and gage it, because there isn't a pumper in the

(Testimony of George Prout.)

field that you can take his word for what he says; he always tells you four or five times more than he is making. Now this is on McGinley No. 15. That is a duplicate separator of this one here.

Q BY MR. WESTALL: A picture of the same separator?

A No, two different traps, but a duplicate trap of this trap. This is 210, and this is 212; and if I remember right the gage glass in that one was broken off.

MR. F. S. LYON: We object to the witness reading something from the back of these photographs unless he put the matter there himself or knows something about it.

THE COURT: Well, I don't know what portion he is reading. What is it he is reading?

MR. F. S. LYON: That is what I want to know. Every time he looks over in order to find out which one of these photographs it is, evidently.

MR. WESTALL: No, I deny that, Mr. Lyon.

MR. F. S. LYON: Let him give his testimony without reading it and we will not have any dispute.

MR. WESTALL: I would like to introduce this first photograph before we get too far behind as Plaintiff's Exhibit No. 41; and the second photograph, of McGinley Well No. 15, as Plaintiff's Exhibit No. 42.

A This picture here was taken of the St. Helens property. I will have to refer to my notebook on these numbers if you want them. (Referring to notebook.) This is on St. Helens Well No. 7. The separator that is standing upon on the pipe is separator 680; the one

(Testimony of George Prout.)

down closer to the ground is 606. They are using that separator as a scrubber for the gas—

MR. F. S. LYON: We object to that as not rebuttal. It is not one of the earlier traps, and there is nothing in our case in regard to that trap whatever. That is one of the alleged infringing traps.

MR. WESTALL: He is merely explaining the photograph, and your own question was as to its operation.

MR. F. S. LYON: We are not trying that. We object to that going into your case in chief.

MR. WESTALL: We show an old trap here, and it simply shows connection with the other trap, and in order to show the connection we must show the other trap.

THE COURT: The objection is overruled.

Q BY MR. WESTALL: Did you finish your last answer?

A No. This separator is one of the old type traps, and they use that to scrub the oil out of the gas after it goes through trap 680 at the St. Helens Oil Company, and we could find no oil in the gage glass.

MR. WESTALL: We offer this last photograph as Plaintiff's Exhibit 43.

A (Continuing) This picture here is Union Oil Company No. 5 at Montebello, trap 195. The gage glass was broken off of this trap and we found oil in the bottom pet-cock but none in the top pet-cock.

Q I call your attention to the weights—

(Testimony of George Prout.)

A And they had weights on the float arm of the separators to make the float operate lighter on the oil.

Q To counterbalance—

A To counterbalance the weight on the float arm so that it doesn't lay so deep in oil.

MR. WESTALL: We offer the last photograph in evidence as Plaintiff's Exhibit 44.

A (Continuing) This separator is at the St. Helens Oil Company's Well No. 3. Mr. Arnett, the pumper, was up there, and I asked him at the time—

MR. F. S. LYON: We object, your Honor.

THE COURT: Yes; don't state what he said.

A (Continuing) No. I asked him at the time where the oil level was maintained in the separator—

MR. F. S. LYON: We object to any statements in conversation with any party.

THE COURT: The objection is sustained.

A (Continuing) —and he stepped up to the separator and pointed his finger on the side of the separator where the oil was maintained in the separator.

MR. F. S. LYON: We move to strike that out.

THE COURT: It will be stricken out as hearsay.

MR. WESTALL: It seems to me, your Honor, it is not hearsay.

THE COURT: Yes, it is what the other man told him by motion instead of by words. That is the only difference.

MR. WESTALL: We offer the last photograph in evidence as Plaintiff's Exhibit 45.

(Testimony of George Prout.)

MR. F. S. LYON: We object to this photograph in so far as any attempt is made thereby to indicate any oil level by motion of the hand. The witness himself must be produced in court.

THE COURT: That testimony will be stricken out.

MR. F. S. LYON: It is a photograph of a man holding his hand on the trap.

THE COURT: Well, we will strike out the hand.

A (Continuing) This is General Petroleum Company, Thompson No. 1, trap No. 308, and that oil level we tested—I went out on the pipe myself and tested the bottom gage at the pet-cock and couldn't get no oil out of the separator at all, out of the bottom.

MR. WESTALL: We offer this last photograph in evidence as Plaintiff's Exhibit No. 46.

A (Continuing) This photograph is on Thompson No. 5 of the General Petroleum Company at Richfield. I put a piece of paper up behind the glass and held an old shovel so that the photographer could take the picture where the oil was located in the separator.

MR. WESTALL: We offer the last photograph in evidence as Plaintiff's Exhibit No. 47.

MR. F. S. LYON: We object, your Honor, to each of these several exhibits in so far as they contain on the backs of them typewritten matter.

THE COURT: Yes; that is not admitted. The legends that appear thereon, or writing on the back, is not admitted.

(Testimony of George Prout.)

MR. F. S. LYON: And will not be considered as a part of the exhibit?

Q BY MR. WESTALL: Are you familiar with the advantages and disadvantages of maintaining an oil level at a certain relative part of the trap?

A I find in my experience that when I hold the—

MR. F. S. LYON: We object to the answer as not responsive.

THE COURT: Answer it yes or no first.

A The question, please?

(Last question read.)

A Yes, sir.

Q BY MR. WESTALL: Please compare the relative advantages or disadvantages of maintaining an oil level above the vertical center of the trap.

MR. F. S. LYON: That is objected to as incompetent, no foundation laid, the witness not having qualified to answer the question; and on the further ground that it is not rebuttal.

MR. WESTALL: I think the witness's qualifications clearly show that he is competent. He is in charge of traps as service man, repairing and fixing and changing traps and noting their operation.

Q BY THE COURT: Have you observed them in operation only, or are you familiar with the manner of construction and setting up of the traps and have you observed them in operation in each case?

A Yes, sir, every separator that is ever put in.

Q You put it in operation?

(Testimony of George Prout.)

A I put it in operation myself, and I adjust the oil level to get the best results.

MR. F. S. LYON: Now may I ask a question on the subject of the qualification of the witness, your Honor?

THE COURT: Yes.

Q BY MR. F. S. LYON: You are connected with the plaintiff Lorraine and the Lorraine corporation as a salesman?

A Yes, sir, a service man.

Q Your experience has been entirely with the Lorraine traps, has it?

A Yes, sir.

MR. F. S. LYON: We submit the objection. He has no knowledge except as to the Lorraine traps, and it is impossible for him to make anything but a theoretical or guess comparison.

THE COURT: I think I will allow the answer.

MR. F. S. LYON: Exception.

THE WITNESS: What is the question?

Q BY THE COURT: If there is any particular height of level at which a trap similar to the Trumble and Lorraine will operate best, what is it?

A Well, now, we save more gas when we operate our oil level above our vertical line than they do when they—

Q When you say vertical line what do you mean —vertical center?

A Vertical center of your separator. By carrying a big volume of oil in the separator it gives the gas

(Testimony of George Prout.)

a chance to escape before it goes into the shipping tanks. When you run your oil level down lower you haven't got the volume of gas there, and it doesn't have time to separate the gas from the oil, and it passes through into your shipping tank, and consequently you have gas blowing into your shipping tanks all the time. I find that wherever I put on a Lorraine separator and carry the oil level high, as against an old style Trumble separator, there I increase the production of their gas very nearly one-third. Any place that I can find an old Trumble separator operating I offer and give them separators and take what I have saved for the pay of the separator. By carrying the oil level above the vertical center we eliminate all the gas into the tanks and give them a clean oil and less evaporation, and we have a better chance to separate the oil from the sand—or the sand from the oil.

Q BY MR. WESTALL: You have made actual tests, have you, with the—

MR. F. S. LYON: We object to that form of question. It is going to be leading.

THE COURT: Yes.

Q BY MR. WESTALL: Have you made tests comparing the old Trumble—

A Yes, with the two separators side by side on a well.

Q How many such tests have you made, approximately?

MR. F. S. LYON: Now if your Honor please, I wish to object to this as not rebuttal, and I am going

(Testimony of George Prout.)

to give you another reason why: All my witnesses who have been excused on the basis that the case in chief was in are now in Washington, D. C. Some of the tests this witness might refer to I would rebut absolutely by the testimony of Mr. Townsend and of Mr. Gutzler if I were not taken by surprise here. This is part of their case in chief. I had no reason for bringing that subject-matter out with Mr. Townsend or Mr. Gutzler when they were here. You can see why I insisted that we had a right to cross-examine Mr. Lorraine as to these assertions, because I wanted to know what I had to meet.

THE COURT: I think as to a comparative test btween the two machines I will sustain the objection.

MR. WESTALL: As showing, however, the qualification of the witness to testify regarding the operation of the old Trumble trap, his qualifications, your Honor will remember, were questioned, and I think that evidence is very pertinent.

THE COURT: Well, that he has made tests. That answer is sufficient. The question as to the comparative tests he is about to relate I think is probably objectionable.

MR. WESTALL: That is all.

CROSS EXAMINATION

BY MR. F. S. LYON:

Q You say you have been familiar for how long with the installation of Lorraine gas traps?

A Since May, 1920, if I remember right.

(Testimony of George Prout.)

Q Familiar with those installed in the Signal Hill field?

A I installed every one that went on Signal Hill, yes, sir.

Q How many traps on any one well, of the Lorraine type, on Signal Hill are there?

A At present I think there is one on each well.

Q Is that all?

A That is all.

Q Have there ever been connected up more than one Lorraine trap on one well on Signal Hill?

A Sure.

Q How many?

A I connected up at one time four.

Q Is that the largest number?

A Yes, sir.

Q And you connected one trap to the next trap in series?

A No, sir, I did not.

Q How?

A I connected them up in parallel.

Q What do you mean by that?

A Where the oil had to be divided and go from one trap to the other. They never were connected in series at all.

Q What do you mean by "series"?

A Series is where you connect the oil into one and run it into the other; where you run it out of one separator and into the other separator.

(Testimony of George Prout.)

Q How did you deliver your flow of oil and gas from the bean of the well into the respective traps in the installation that you are referring to?

A I ran the 4-inch line from the well out to the separators and I put cross and bull plugs in there, in a manifold and splitting the oil, first hitting one cross and then hitting another cross, and the oil would divide and go each way.

Q And the traps were acting entirely independent of each other?

A Entirely independent of each other; yes, sir.

Q Now why didn't you use simply one trap?

A Well, because I wanted to sell four.

Q One trap would have handled it, would it?

A One trap would have handled it; yes, sir. But they wanted four traps and I sold it to them. If they had wanted a dozen I would have given it to them.

Q And there was no necessity for more than one trap?

A There was no necessity for more than one; no, sir. I have handled twelve thousand barrels of oil with one separator.

Q Referring now to Plaintiff's Exhibit 43, which is the old Trumble trap in that photograph (showing exhibit)?

A That one right there (indicating).

Q The one on the left-hand side of the picture?

A Yes, sir. That is the one that has no means of adjusting on the outside.

(Testimony of George Prout.)

Q Now the one on the right-hand side is one more recent?

A Yes, sir.

Q And one of what you are informed is alleged to be the infringing type of Trumble trap?

A I am not informed in that, sir.

Q This is one of those that you know are complained of?

A That is one that I know was built at the time we put on the test for the General Petroleum.

Q Now this trap is connected with the old trap in series, is it not, so that the oil and the gas from the new trap goes through the other trap to make another separation?

A Yes, sir. The gas from the new trap passes through the old trap and they scrub the gas over again there.

Q Do you know whether Mr. Funk was subpoenaed to accompany you on May 4 on this trip to the oil fields and see these old traps?

A Do I know whether he was subpoenaed?

Q Yes.

A No, I don't know a thing about it.

Q Do you know whether he voluntarily went along of his own will?

A I don't know a thing about it; no, sir. I didn't know he was going until we drove to his house.

Q You went to his house to get him?

A Yes, sir.

(Testimony of George Prout.)

Q And who was in the machine with you at that time?

A The photographer and Mr. Lorraine and myself.

Q And Mr. Westall?

A No, sir.

Q You picked up Mr. Westall later?

A Yes, sir.

Q Now where was it you got Mr. Funk?

A We got Mr. Funk at his house.

Q Where; what city?

A At Alhambra.

Q And then you drove to Mr. Westall's house?

A Yes, sir.

Q And then out to the oil fields?

A Yes, sir.

Q Now on your other visit—April 23 was that?

A April 27.

Q Was Mr. Funk along with you then?

A Yes, sir.

Q And where did you meet Mr. Funk at that time?

A At his house at Alhambra.

Q And at what time of the day?

A Around about nine o'clock in the morning.

Q And who was with you?

A Mr. Lorraine and the photographer.

Q Where did you go?

A We went out through Montebello and out through the Union Oil Company's property and out through Richfield.

(Testimony of George Prout.)

Q Now on both of these occasions did Mr. Funk return from that trip with you?

A Yes, sir.

Q And you took him back to his house?

A We took him back to his house; yes, sir.

Q Do you know whether he was subpoenaed by order of the court to attend on April 27?

MR. WESTALL: The witness has already answered that question.

MR. F. S. LYON: Not that one.

A No, sir.

Q I show you Plaintiff's Exhibit No. 40. Of what trap is that a photograph?

A That is off of Hole 6.

Q And do you know what the condition of the operation of the well was at that time?

A Only that the well was operating.

Q You didn't feel the float arm?

A No, sir; I never touched it.

Q And you never tried to see if the oil was flowing in and out of the trap, did you?

A No, sir. I could hear it flow there.

Q You could hear a gurgling of the oil in it?

A A gurgling of the oil and the gas passing through; yes, sir.

Q Did you in any manner change the adjustment of the float lever in this connection?

A No, sir, I did not.

Q That was just as the trap stood at that time, was it?

(Testimony of George Prout.)

A Just the way it was when we went up there and the way it was when we left.

Q And the same is true of Plaintiff's Exhibit 39, is it not (showing same)?

A Yes, sir. That is Hole No. 18. The only thing I done on that was to open the gage glass cocks to let the oil into the gage glass.

Q Do you know whether the oil cocks on either of those gage glasses, at either end, were open or closed—clogged or wide open?

A On which one?

Q On any one that you visited.

A Yes; I opened them up and let the gas blow through.

Q. It blew through the top?

A Yes, sir; and oil come out of the bottom.

Q And how high above the oil outlet was the lower end of the gage glass?

A I didn't understand the question.

(Question read.)

MR. WESTALL: What particular trap are you referring to now, Mr. Lyon?

MR. F. S. LYON: These two last ones testified to.

A On Hole 18?

Q On Hole 18 and Hole 6.

A The gage glass is about an inch and a half from the rivets.

Q That is not my question. I asked you a specific question.

(Testimony of George Prout.)

A Read that question again, please.

(Question re-read.)

A The lower end of the gage glass was about seven inches below the oil outlet.

Q And how high above the manhole was the upper end of the gage glass on Chapman No. 1 when you saw the trap at that time?

A Will you read that question again, please?

(Last question read.)

A The upper end of the gage glass was about three-quarters of the manhole—about a quarter of the way from the top of the manhole down, as near as I can remember.

Q What well on that lease was connected with that trap at that time?

A I couldn't answer that.

Q Do you know whether it was No. 1, No. 2, or what number of well?

A There was nobody there that could give us that information.

Q Do you know whether it was the discovery well, No. 1, that was still connected at that time?

A I couldn't tell you; no, sir.

Q You know nothing about whether, as a matter of fact, any well was actually connected that day, do you?

A Yes, there was a well connected that day, because I could hear the gas and oil passing through the separator.

Q Now on this Hole lease, Well No. 6, the Trumble trap there that you say you observed on May 4,

(Testimony of George Prout.)
where did you say the oil level was with relation to the bottom of the gage glass?

A There was no gage glass in it.

Q Well, where was the oil level in that trap at that time?

A You couldn't tell. All you could do was to open up the pet-cock and the oil would shoot out.

Q It might have been anywhere between a little above the bottom cock up to near the upper cock, then?

A No, it was not near the upper cock.

Q I say, it might have been so far as your test would show?

A Well, if it was anywhere near up over half way the oil would come out with the gas in the top cock. When you get dry gas out of the top cock you can bet there is no oil in it.

Q Did you get dry gas out of the Trumble trap at that time?

A Yes, sir.

Q In that Hole 6?

A Clean gas, yes, sir.

Q On May 4 of this year?

A Yes, sir.

Q Then can you tell me positively from what you saw on May 4 where the level of oil in that particular trap on the Hole 6 was at the particular time you took the photograph?

A No; we had no means of seeing through the shell unless we put a gage glass on it.

(Testimony of George Prout.)

Q Now how many of the Lorraine traps have had this gas dome added to them? Practically all of the recent ones; isn't that so?

A Yes, sir. About three hundred, or somewhere in that neighborhood, when we started putting the dome on.

Q And how long is the cylindrical shell of the trap proper?

A How long is it?

Q Yes.

A I couldn't say for sure. I don't know.

Q You don't know?

A. No, sir.

Q Approximately?

A In the neighborhood of about twelve feet, I think.

Q And how long is this cylindrical dome which has been imposed?

A About 36 to 38 inches.

Q About or over three feet?

A Somewhere in that neighborhood. I don't say whether it is over or whether it is a little under.

Q And you have added 36 or 38 inches, more or less, to the gas chamber of the trap by that dome, have you?

MR. WESTALL: We object to that as not proper cross-examination, and as irrelevant and immaterial.

MR. F. S. LYON: I will make it material in just a minute in another way.

MR. WESTALL: This relates to the present construction. Now we are suing on a patent, not on

(Testimony of George Prout.)

our present construction. That is not material, what we are making. We do not have to make anything in accordance with the patent.

THE COURT: It relates to the question of oil level about which he has testified. You may proceed and it will be stricken out if it is not shown to be material.

(Last question read.)

A Yes, sir.

Q BY MR. F. S. LYON: Now before that dome was added where did you carry the oil level in the Lorraine traps? When I say where, I mean in feet and inches from the bottom of the trap.

A I can't give it to you in feet and inches, because I don't know the exact length of the trap.

Q How much above the vertical mid-center was it carried?

A From eight to ten inches.

Q How much?

A About eight to ten inches.

Q And you have added 36 to 38 inches vertical extension of gas chamber to this dome; is that correct?

A Yes, sir.

Q Now you have taken in a number of the older Lorraine traps and added this dome to them, have you?

A Yes, sir.

MR. WESTALL: Now, if the Court please, I do not see the materiality of this testimony at all.

MR. F. S. LYON: That is all, your Honor.

(Testimony of George Prout.)

MR. WESTALL: Then we move to strike out the testimony.

Q BY THE COURT: Have you raised the oil level with the addition to the cylinder?

A That is the reason we put the addition on, so that we could raise the oil level higher and get cleaner oil into the shipping tanks.

Q And you still maintain it where it was, proportionately, about the center?

A Above the center; yes, sir.

Q BY MR. F. S. LYON: In what trap have you so raised the oil level?

A I raised one yesterday so that it was up very nearly to the top of the separator, so that they could pull a vacuum on the gas separator without getting oil into the gas line.

Q How much vacuum?

A They are pulling from one to two inches.

Q And that is not the usual operation of a trap with vacuum on it, is it?

A Yes, sir; with the Lorraine separator. I raise all my oil levels up higher.

Q Is that a mercury or water reading of one inch vacuum?

A I don't know. I didn't read it. I know nothing about that at all.

Q Have you seen any of the Trumble traps operated under such a vacuum system?

A Not unless they put on a Davis regulating valve.

(Testimony of George Prout.)

Q I asked you if you had ever seen any of the Trumble traps operated under that vacuum system.

A Yes.

Q Where and when?

A They are operating them now at Santa Fe Springs for the Amalgamated Oil Company.

Q They have changed them over from the other method of operation—changed their position and put on a vacuum pump and additional valve apparatus, haven't they?

A Yes, sir.

Q And that is not the mode of operation that was utilized with those traps before the change of position and the addition of the valve mechanism and vacuum pump, was it?

A No, sir.

Q Now where have you ever used one of these extended dome constructions of the Lorraine gas trap and raised the oil level therein without the use of the vacuum system?

MR. WESTALL: We object again, your Honor, It is not proper cross-examination, and it is incompetent and irrelevant. The construction and use of these later traps is not at all material to the controversy. We are suing on a patent.

THE COURT: It is only this, Mr. Westall, that the witness has given his opinion as an experienced man as to the point at which the oil level should be maintained, and now he has testified that with the added length of cylinder he still pursues that method

(Testimony of George Prout.)
and maintains a medium height of oil level; and that is consistent with his other testimony. Now they are attempting to show, I presume, that he is adopting some other or added auxiliary or expedient to that, which might modify his first opinion. That is what I imagine they are attempting to prove. I am only guessing at it thus far. If that is so I think it is cross examination.

MR. WESTALL: Well, my point is that while he has testified to certain advantages of maintaining a substantially uniform volume of oil above the vertical center of the receptacle he has not testified as to present constructions, and it wouldn't make any difference whether he followed that or not. Whether they departed entirely from and abandoned the use of this high oil level would not make any difference in this controversy. They might adopt many other means and methods that were improvements or otherwise and still it would not affect the question whether or not they were infringing this patent and whether the features shown in that patent—among others a high oil level—were advantages.

THE COURT: Well, maybe you are correct on that. I will sustain the objection.

MR. F. S. LYON: Exception.

THE COURT: Of course it would be cross examination where a witness has testified that it is advisable to maintain a medium height oil level to show that he was doing something else. If it was something inconsistent with that it would tend to impeach

(Testimony of George Prout.)

that opinion, showing that something else was being done as a matter of practice, to detract from the opinion he has given on that point. But unless that is the purpose—

MR. F. S. LYON: That is the purpose of it, and we submit that is what it does.

THE COURT: But you are making a new apparatus, and you are importing a vacuum system—

MR. F. S. LYON: No; this particular question, your Honor, is stripped of the vacuum system. I am finished with the vacuum and now I am asking him if they have not used this same dome extension under separation conditions in which vacuum was not used and in which they left the oil level the same as it was before.

THE COURT: I didn't understand that to be the question. I will allow that question. I understood you were still carrying the vacuum with it, which of course would make some difference.

MR. F. S. LYON: No; I am excluding the vacuum.

THE COURT: Now you may answer as to whether in adding an extension to the cylinder you have not left the level in its original position or where it was before.

A We added the extra height onto the separator so that we could raise our oil level higher and get cleaner oil into our shipping tanks.

Q But the question is did you raise the oil level higher in all cases or have you operated without doing it.

(Testimony of George Prout.)

A No, sir, we raised the oil level higher.

Q BY MR. F. S. LYON: Now do you mean to testify that if you left all other conditions the same with regard to the point of oil discharge, the mounting of the float, your vertical partition and your oil inlet. and simply extended the vertical length of your shell eight feet, carrying your oil level at the same point in the trap from the bottom that you had before, that that would make any difference in your mode of operation of your trap?

A But we didn't carry our oil level at the same—

Q Answer my question. Would that, in your opinion, have made any difference in the mode of operation?

A Why, if we had left the oil level the same it would not have, no.

Q And it wouldn't have made any difference in the quality of the separation at all, either, would it?

A Yes, sir.

Q The extended gas chamber of from two to eight feet on top would have made what difference?

A It gives you a cleaner gas, a dryer gas.

Q Now why? Why is it cleaner or dryer?

A Because you are holding more oil in there and it gives your gas a chance to rise higher.

Q Haven't you the same quantity of oil in there under the circumstances of the question?

A No. Under the circumstances of your question, yes, but we are not doing—

(Testimony of George Prout.)

Q Well, that is what I am asking you about. Now if you simply extended the length of your trap up, and changed nothing else, so that your so-called normal oil level was two feet below the mid-vertical center, and you had an extended trap of anywhere from four to ten feet above that, of gas chamber, what difference would that make in the mode of operation of your trap?

A A lot of difference.

Q Why?

A Because you don't get the clean oil into your shipping tanks that you would if you raised your level higher.

Q Why?

A Because you will have your oil in the separator longer so that the gas has a chance to get out.

Q Now how do you, under the conditions of the question? My question said the same quantity of oil—

A I told you it made a difference.

Q (Continuing) —and the same height? Now yes or no. You don't change the lower end of your receptacle at all; you maintain just as large a volume of oil as you ever did. You have extended the top gas chamber from four to eight feet. Now what difference does that make in the mode of operation or the result of the trap?

MR. WESTALL: Now, if the Court please,—

A Well, that wouldn't make any difference in the operation of the trap. But now I am going to ask

(Testimony of George Prout.)

you a question. How about your shipping tank—your oil in your shipping tanks?

Q BY MR. F. S. LYON: I am asking you what difference.

A Well, I said it wouldn't make any difference in the operation of the trap, in the function of the separator itself. It wouldn't make any difference.

MR. F. S. LYON: That is all.

Q BY MR. WESTALL: You were asked regarding some Union Oil Company wells, whether you had observed or tried the float arm to determine the level of the oil, and you said you had not. Will you please explain why you did not, and why you did not consider that a good means of determining the oil level?

MR. F. S. LYON: That is objected to as assuming a fact not testified to by the witness.

THE COURT: Yes, that he did not.

MR. WESTALL: Cross out the latter part of the question.

A Because I never fool with a separator on any well, because the pumpers and gagers don't want no one fooling around their well with the separator. I always make it practice not to go up and regulate or touch a separator unless I get permission from the superintendent. That is why I never fool with the float arms.

MR. WESTALL: That is all.

Q BY MR. F. S. LYON: As a matter of fact, if you open the pet-cock on those gages the drip of

(Testimony of George Prout.)

the oil runing down the side will show in the top of the gage glass, will it not?

A No drop of oil will run down the tube unless the oil is up there. There may be a little spray, but no oil.

Q In other words, a film of oil does not run down the interior surface of the Trumble trap?

A There might be a little dribble in there, but it isn't oil coming out.

Q. What is it?

A Why, it is—that is what we call dry gas; as good as you can get right out of the—

Q That is what you mean by dry gas, is it?

A Yes, sir; that is not oil.

(An adjournment was thereupon taken until Wednesday, May 14, 1924, at ten o'clock a. m.)

LOS ANGELES, CALIFORNIA, WEDNESDAY, May 14, 1924, 10 A. M.

(Appearances as previously noted.)

GEORGE PROUT recalled.

REDIRECT EXAMINATION

BY MR. WESTALL:

Q Mr. Prout, you were asked concerning certain extensions on the top of the gas trap which has been made by the Lorraine Corporation. Could you tell us how high those extensions were and describe them more fully than you have?

(Testimony of George Prout.)

A Why, we have made some thirty-six inches high and we have made some fourteen inches high, and we have made some four inches high. We have made five different types of separators to date.

Q What size are being made and distributed at the present time?

A The size being made and distributed at the present time has a dome on four inches high.

Q I call your attention to Plaintiff's Exhibit 6, an illustration of the Trumble oil and gas separator, and also to a trap illustrated in Plaintiff's Exhibit 24, and I will ask you to compare briefly the differences in oil level between those traps as you have observed them.

Mr. F. S. LYON: We object to that on the ground it is not redirect examination, and he has not been asked whether on direct or cross in regard to any of these exhibits.

MR. WESTALL: This is not redirect examination, I will admit, your Honor. I am asking a question that I overlooked.

THE COURT: Very well, as a part of the direct.

A On Exhibit No. 6 we have the Trumble separator where he holds and maintains a uniform volume of oil up above the vertical line in the center of the separator. It is operated by a float inside and an outside oil valve. On Exhibit 24 he shows here a separator which has no means of control on the outside, and the oil level has no means of holding or maintaining a uniform volume of oil above the vertical line of the separator.

(Testimony of George Prout.)

Q BY MR. WESTALL: I would like to ask you if you understand the construction of the device illustrated in Defendants' Exhibit YY, which I show you.

A Yes, sir.

Q Will you please compare the volume and level of the oil contained in the trap illustrated in the exhibit before you, Defendants' Exhibit YY, with the Trumble gas and oil separator being made and used at the present time, the new separator?

MR. F. S. LYON: We object to that as not rebuttal testimony, and on the further ground that it is indefinite and uncertain and the witness is not qualified to answer the question. He has not shown that he has ever seen the inside of what counsel says is the present time traps.

THE COURT: It should be shown that he knows and has examined the traps now being used.

Q BY MR. WESTALL: Have you known and examined the traps made by the Trumble Company now being used?

A Yes, sir.

Q Will you then answer the question?

MR. F. S. LYON: I would like to ask a question, your Honor.

THE COURT: Yes.

Q BY MR. F. S. LYON: What trap did you refer to in your last answer?

A The separator that we have in our shop today.

Q And what sized separator is that?

A A No. 2.

(Testimony of George Prout.)

Q Do you know its number?

A Not definitely; no. It is eleven hundred and something. I won't say for sure what the number is.

MR F. S. LYON: It is the one, Mr. Westall, to which you have heretofore referred and have offered in evidence this drawing of, is it?

MR. WESTALL: Yes; it is a copy.

MR. F. S. LYON: I want to know what trap he is talking obout.

THE COURT: Yes.

THE WITNESS: What is the question?

"Q (Read by the Reporter: Have you known and examined the traps made by the Trumble Company now being used?"

THE COURT: Meaning specifically the one that you say you had in your possession and of which a drawing is here on file, comparing it with that one.

A The one that we have at present has no cone bottom, and the manhole is up above the vertical line of the separator. This separator here has a cone-shaped bottom which fills with sand and mud and water, and it has an inside ball float on it which maintains an oil level around the bottom of the manhole. If the oil level should happen to raise and go above that they would have trouble with their gas line. The oil is admitted into the separator the same way as the one in the shop, with the exception of we have a wearing plate on the gas line pipe to prevent the sand from cutting out the pipe. The cones are the same, with the exception, if I remember right, the one in the shop

(Testimony of George Prout.)

has two cones instead of three. And the gas line pipe, the one we have in the shop, comes down from the top of the separator out through the lower portion of the separator. In this the gas pipe goes out through the top of the separator. This separator has a balanced oil valve, and the one in the shop has a slide valve.

Q BY MR. WESTALL: The one in the shop that you referred to is the trap illustrated in this drawing, Plaintiff's Exhibit 26, is it?

MR. F. S. LYON: That is objected to as leading and suggestive and calling for the conclusion of the witness, and incompetent, and no foundation laid.

A This is the drawing of the separator that we have at our plant today.

Q BY THE COURT: Does that correctly represent it?

A Yes, sir.

Q BY MR. WESTALL: Comparing that drawing with the exhibit you last referred to, what difference is there in the capacity of the separator for maintaining a uniform volume and level of oil at any given point?

A The cone bottom will maintain or hold approximately one-third as much oil as this will maintain or hold up to the vertical center. The separator we have in our possession today will hold and maintain a larger volume of oil to the vertical line of the separator than the one in Exhibit YY.

MR. WESTALL: That is all.

(Testimony of George Prout.)

RECROSS EXAMINATION

BY MR. F. S. LYON:

Q Referring to this Trumble gas trap which you say you have in the Lorraine shop, and which you say is exemplified in Plaintiff's Exhibit No. 26, are we to understand from your testimony that the maintaining, as you have called it, of an oil level above the mid-vertical extension of the trap changes the mode of operation of the trap from what the trap would be if the oil level was maintained below the mid-vertical center?

A Yes, sir.

Q And then, as you understand, the operation of the Lorraine trap is dependent upon the oil level being maintained above the mid-vertical center of the longitudinal extension of the trap, is that correct?

A No. sir.

Q How do you harmonize the two statements of your last two answers?

A When you hold your level above the vertical line of your receptacle you carry a larger volume of oil in your chamber and that gives the gas longer, or the oil longer, to settle there and extract the gas from the oil. You get cleaner oil in your tanks and you get dryer gas in your oil line, whereas if you hold your oil down at the bottom of your receptacle you will have more gas in your oil tanks.

Q Then as you understand the operation of the Lorraine trap, it depends upon the the volume of oil maintained within the trap?

(Testimony of George Prout.)

A No, sir.

Q Why is it that you state the Lorraine trap is not dependent upon the maintenance of a volume of oil or a liquid level above the mid-vertical center?

A I don't understand that question. Please read it.

(Question read).

A I don't quite understand that yet.

Q What has the maintenance, as you say, of an oil level above the vertical center of the trap got to do with the operation of the trap?

A Why, it cleans your oil better. You get cleaner oil in your shipping tank.

Q What has the fact that the oil is kept at or near the vertical center got to do with it?

A You have got more oil in your separator and the longer you hold your oil in your separator the cleaner the oil is in your gas tanks.

Q Then it is solely a question of the volume of oil, is it?

A Yes, sir.

Q And it wouldn't make a bit of difference in this trap of Plaintiff's Exhibit 26 if the trap had added to it ten feet more of shell and the cones are raised up, and the inlets up at the top and the float outlet mechanism remained the same at the bottom as they are now; is that true?

A Will you read that question again, please?

(Question read).

(Testimony of George Prout.)

A I would say it was, yes.

Q It is true?

A Yes.

Q The Lorraine traps have been usually of what longitudinal dimensions?

A 42 inches and 36 inches in diameter.

Q The longitudinal dimension, I mean.

A Oh. We are making them 10 feet, 12 feet, 8 feet, and 9 feet.

Q The traps that you last referred to this morning, which had the dome approximately 4 inches on them, were the small sized traps which are designed for low pressure traps, are they?

A Yes, sir.

Q And not the high pressure traps that have been used on the so-called gusher wells of Santa Fe Springs and Signal Hill?

A No, sir.

Q The Trumble trap that you have down at the shop has a longitudinal dimension of 8 feet, is that correct?

A I never measured it up.

Q You never measured it up?

A No, sir, I never measured it up.

Q Do you know what its cross-sectional dimension is?

A I should say about 42 inches.

Q Did you ever measure it?

A No; but just by looking at it.

(Testimony of George Prout.)

Q Do you know how far from the lower end of the trap is the oil outlet?

A No, I do not; but I should think—

Q I am not asking you to guess; I want to know what you know about this trap. Do you know how high above the bottom of the trap is the pivotal mounting of the float lever?

A No, I do not know exactly how far it is.

MR. F. S. LYON: We move to strike all of the testimony of this witness in regard to this Plaintiff's Exhibit No. 26, and as to the drawing being a correct drawing or representation of the trap, from the record, and to exclude it from consideration, on the ground it is incompetent and no foundation laid.

THE COURT: I think another witness did testify to its accuracy, that is, that it was accurate.

MR. F. S. LYON: The testimony of this witness I am referring to at the present time.

THE COURT: But if another witness has verified the drawing as being correct it is immaterial whether this witness says it is correct or not. I think another witness did say that the proportions are properly represented.

MR. WESTALL: The proportions as shown on the drawing itself.

MR. F. S. LYON: I am not asking to strike out the drawing; I am asking to strike out the testimony of this witness in that regard.

THE COURT: That portion may be stricken out, and I can rely on the other testimony; but I think it

(Testimony of George Prout.)
has been established prima facie that it is correct. He didn't make the drawing and of course he doesn't know except by looking at it. His other testimony may remain. As to whether it is correct I think has been established by another witness.

MR. WESTALL: I think that is true; and the value of the witness's testimony is that he has seen the trap and knows the general construction, and that the trap is the same as shown in the drawing.

MR. F. S. LYON: I object to any such imputation. If the witness cannot tell us anything about whether this drawing is correct or not I submit that he ought not to be allowed to testify in regard to any particular dimensions or any particular relations, if he doesn't know. That is a material thing in this case, and it is for that reason I submit the objection and motion is well taken. It is not the testimony of some other witness.

THE COURT: He says that he has seen the trap; that he has looked at it and examined it, and this drawing is brought in incidentally to illustrate his testimony. I suppose he might discard that and say from what he has seen of the trap itself which they have in their possession that it is so and so. I will deny the motion except as to the statement that the drawing is correct. That may be stricken out, because he didn't make it and has not measured it and doesn't know.

MR. F. S. LYON: Note an exception.

Q BY MR. F. S. LYON: Assuming that this Trumble trap, which you say is at the Lorraine Cor-

(Testimony of George Prout.)

poration's plant, has a longitudinal dimension of 8 feet, what difference in the separation of the oil from gas, or sand from the oil and gas, from an oil well in actual operation would the extension of such trap so that it was 16 feet long have if you retained the mounting of the float arm and float the same as it is now in the trap, in the same identical place, not moving it at all, and retained the oil outlet in the same place that it is now, and retained the valve mechanism the same without any change, simply moving your baffles, oil inlet, and gas outlet to the extended top of the trap?

A Well, as I am not an engineer I don't know and I won't answer that. I don't know what to say.

Q If you moved it one foot what difference would it make, if you extended it one foot?

A I am not versed enough to say.

Q So far as you know would it make any difference?

A Why, yes. You would get drier gas.

Q You would get drier gas?

A Yes, sir.

Q The longer gas chamber you had above the level of oil the dryer gas you would get, is that correct?

A Yes; certainly.

Q Why would that gas be drier?

MR. WESTALL: If the Court please, the witness has already stated that he is not an engineer, and he is being questioned as an expert upon matters upon which he is not qualified.

(Testimony of George Prout.)

THE COURT: He has testified in the nature of a practical expert as to an examination. I will allow him to answer.

A Why, the higher you take the gas up in the air the drier it gets. The oil has a tendency to settle.

Q BY MR. F. S. LYON: In other words, the oil has more of a chance to be released from the gas?

A Why, I think you would get away from that fine spray that you have if you have the oil level up close to the top.

Q Why wouldn't you change your oil level and bring it up to the vertical center of the trap?

A That is what we did.

Q That is not in my question, and I kept the oil level at the same point as the trap at the Lorraine Corporation plant, and my question to you was either add one, two, five or ten feet of extension on top of the trap and what diffeernce would it make in the mode of operation.

MR. WESTALL: I think the question has already been asked and answered several times, your Honor.

A On the Trumble separator it didn't raise the top of it. They move the oil level.

MR. F. S. LYON: We move to strike that from the record as not responsive.

THE COURT: It may be stricken.

MR. F. S. LYON: Read the question, please.

(Question read).

(Testimony of George Prout.)

Q BY THE COURT: The question now asked you is why you wouldn't raise your oil level up to half way in the cylinder.

A Why I would not raise it up?

Q Yes.

A If I was building the separator I would raise it up, but being as I didn't build it I don't know why it wasn't.

Q BY MR. F. S. LYON: Then from your knowledge of gas traps you can't tell whether it would have any difference in the mode of operation or function at all, is that it, to extend the longitudinal extension of the trap without changing the oil level from where it now is on that shell?

THE COURT: He has said you would get cleaner gas.

A The only difference is you would get cleaner gas, is all.

Q BY MR. F. S. LYON: In the Lorraine trap the incoming stream of oil and gas is received where?

A In a separate compartment.

Q Trace its course for us from there down to the time that the gas is separated from the oil and the oil discharged.

A The oil enters in the separator near the top and it passes through a perforated box at the bottom, perforated holes, and flows downward through the separator into this separate chamber. The oil goes down to the bottom of the separator and has to go in under

(Testimony of George Prout.)

the chamber and up above the vertical line of the separator.

Q In other words, in passing around the bottom of this vertical partition the incoming stream must pass through a body of liquid?

A Yes, sir.

Q What effect has that in the Lorraine trap?

A Why, that forms a current of oil passing through there.

Q And what effect has the forming of a current of oil in that manner?

A Well, the effect of oil passing through in that manner is the froth would all be contained in this separate chamber. When you flow oil into a separator it fills up with froth. That is the hardest part of separating oil and gas, is to keep that froth out of your gas line. Going into this separate compartment the froth is maintained and held in that position. Then the oil goes down through and settles the sand out of it and raises up, and we take the oil out of the bottom of the separator and deliver it to the shipping tanks.

Q Do you understand that there is a separation of the gas from the body of the oil that is in the main chamber of the separator?

A Yes. That there is operated on after it passes through this partition. That is a reason we hold a large volume of oil in the separator.

Q Is that a material amount of separation from the liquid body that is in the large chamber of the separator? Is that a material separation of gas there?

(Testimony of George Prout.)

A I should say it was; yes.

Q It is your belief it is?

A Yes.

Q In the Trumble trap of Plaintiff's Exhibit 26, assuming that to be a drawing of the Trumble trap at the Lorraine Corporation's shop, you do not find a vertical partition, do you?

A No, sir, I do not.

Q You do not find a gas chamber for the separation of this froth?

A No, sir, I do not.

Q You do not find any means of directing the frothing oil and gas into a body of liquid through which it must pass before it reaches the gas separation chamber, do you?

A No, sir.

Q Do you consider, then, that the Trumble separator referred to and the Lorraine separator work upon the same principle?

A No, sir; not as far as the gas separator is concerned.

MR. F. S. LYON: That is all.

MR. WESTALL: That is all.

(Testimony of David G. Lorraine.)

DAVID G. LORRAINE,

recalled as a witness on behalf of the Plaintiff, in rebuttal, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESTALL:

Q Mr. Lorraine, when did you conceive of the invention described in the patent in suit, particularly that illustrated in Claims 17, 18, and 19?

A It was in August, 1911.

Q When did you first disclose that invention to anyone else?

A It was in 1915, in August or September.

Q At the time of your first conception in 1911, did you make any drawings or sketches?

A Yes, sir.

Q Can you produce any of those drawings or sketches?

A Yes, sir.

Q Where are they?

A You have them there, I think.

Q For 1911?

A Yes, sir.

Q Well, we will leave that go for the present and I will ask about that later. Did you make any disclosure after 1915 to anyone else?

A In the years 1917 and 1918 to Mr. Ballanfonte, Mr. Campfield, of the Pacific Oil Company, and Mr. Pew.

(Testimony of David G. Lorraine.)

Q At the time you made those disclosures did you show to any of the last mentioned gentlemen any drawings?

A Yes, sir.

Q Please state whether this is the drawing that you showed any of the gentlemen mentioned.

A That is one of the drawings, yes, sir. I had another drawing, a large one just like that.

MR. WESTALL: Let the record show that the witness refers to Plaintiff's Exhibit 32.

Q When did you make the drawing of Plaintiff's Exhibit 32?

A It was in 1917 when I finished this drawing.

Q After you finished the drawing what did you do with it?

A I made working drawings of it, and I made a small model.

Q At the time that you showed the drawing to Mr. Pew did you exhibit these drawings, Plaintiff's Exhibit 32 and 32-a? At the time that you exhibited those drawings to the persons that you have mentioned did you show it to anyone else?

A I showed it to Mr. Pietzschke and Mr. Ballanfonte and Mr. Campfield, and several other men around there.

Q There is a name signed here "Edward W. Pietzschke".

A Yes, sir.

Q And the date August 26, 1918.

A Yes, sir.

(Testimony of David G. Lorraine.)

Q What does that signify?

A Why, they were just witnesses of the drawing. I was trying to get my gas trap on the market. I had one with inside valves and one with outside valves, and it just merely signifies that they witnessed the drawings before I showed the drawings to any people.

Q Did they write those dates on the drawings at the time they signed the drawings?

A Mr. Pew did; yes.

Q And how about the date opposite Mr. Pitzschke's name?

A I couldn't say. I think Mr. Pietzschke did, though.

Q Where is Mr. Pietzschke now?

A I couldn't locate him.

Q At the time you exhibited the drawings to each of these gentlemen who have signed the drawings, did you explain the operation of the device?

A Yes, sir.

Q After you made that disclosure and explained the operation of the device to the witnesses you have mentioned, what did you next do toward putting your idea in practical form?

A Well, I had several drawings and several types of traps. I was trying to get oil companies interested in some of them. They all were on practically the same principle. Some were large and some were small, that is, that I had working drawings of. I went to the Union Oil Company and explained the thing to Mr.

(Testimony of David G. Lorraine.)

Funk, the man who testified here as a witness, in May, 1919, and I showed him drawings of the trap.

Q I now place before you Plaintiff's Exhibit No. 4 and will ask you to state if you recognize those drawings and the circumstances of their production.

A This is a photostatic print of a Patent Office drawing from Victor J. Evans, of Washington, showing I applied for a patent on this in July—

MR. F. S. LYON: We object to that on the ground it is incompetent, not the best evidence, and move to strike that statement from the record, any statement in regard to an alleged application or an application date. That can be proven by the records and not by oral testimony.

THE COURT: It may be stricken out.

Q BY MR. WESTALL: Did you ever prepare an application for a patent on the device illustrated in the drawing before you?

MR. F. S. LYON: We object to that question as leading and suggestive, and calling for the conclusion of the witness, and not the best evidence. The best evidence is the application, if he had one prepared, as to what it was prepared on.

MR. WESTALL: The best evidence, to my mind, in the preparation of the patent application is the evidence of the one who had it prepared. We are not attempting to prove the filing of any patent application by that question. We are attempting to prove the preparation preparatory to filing it.

(Testimony of David G. Lorraine.)

THE COURT: He may answer as to whether he prepared an application, but as to what that application shows of course you will have to prove differently.

A Yes, sir. I have a receipt from the Patent Office for it, dated July 21, 1919.

MR. F. S. LYON: We move to strike out the last part of the answer from the record as not responsive, and incompetent, and not the best evidence.

THE COURT: It may be stricken out.

Q BY MR. WESTALL: I show you Plaintiff's Exhibit No. 23 on the former trial, and will ask you to state if you have ever seen that before.

A Yes, sir.

Q What is that?

MR. F. S. LYON: We object to that on the ground it is incompetent and not the best evidence. The document, if it is competent for any purpose, will speak for itself. We further object to the document on the ground that it is not certified. It is a mere printed signature. In explanation so that your Honor may see that I am not captious, I want to call attention to the fact that applications for patents are secret. Abandoned applications can never be inspected except by the inventor or his record attorney or someone authorized by him. There is no way that we can find out anything that is in this Patent Office except as to issued patents, and if there is anything they want to prove in regard to prior applications of that kind the Court must rigidly enforce the rules as to the competency of evidence, because everything of that kind

(Testimony of David G. Lorraine.)
must come by surprise. It is within their power to produce competent and proper certified copies. It is not within our power to meet that evidence in any way whatever.

MR. WESTALL: The Court does not know yet the character of the document that has been placed before the witness. This is an original receipt signed by the Commissioner of Patents, acknowledging receipt of "petition, petition oath, drawing, and first fee of $15 of your application for paatents on traps," dated July 21, 1919.

THE COURT: That would only show that some application was made, is all.

MR. F. S. LYON: And it is totally immaterial to do that unless it is to be followed up to show that it has something to do with this case.

MR. WESTALL: It is only a link in the chain of proof. That is all we expect to show by it.

MR. F. S. LYON: It is not linked unless it is followed up.

THE COURT: It simply furnishes evidence of the fact that some application was filed.

MR. WESTALL: Yes; that is all it is introduced for.

THE COURT: If you expect to follow it up—

MR WESTALL: I do expect to follow it up to show the character of the application which was prepared.

MR. F. S. LYON: You say you do expect to do that?

(Testimony of David G. Lorraine.)

MR. WESTALL: Yes.

MR. F. S. LYON: We demand the production of a certified copy of that application as filed, and insist upon our motion to strike and our objection if that demand is not complied with. I make it in the form of a demand, your Honor, because that is the only way we can get it, and if they haven't the certified copy here, why, it must be excluded.

MR. WESTALL: The Court may have some confusion as to the purpose of this evidence in the main. We are trying to prove the making of certain original drawings, not the filing of this application. There were certain drawings made. Those original drawings are the best evidence. Those drawings were lost. When I get to it I will show that those original drawings have been lost, but we have a photographic copy, the equivalent of it. We have secondary evidence of the contents of those drawings, and we are not technically proving the filing of an application. It doesn't make any difference whether it was filed or abandoned, or what became of it. We are proving the making of drawings by the best evidence we have.

MR. F. S. LYON: It makes a difference entirely to this case, however, or it may make this difference, which is my surmise and I think it is correct: that whatever that application was on it was not on and did not show the invention that we are here litigating. That is the only thing that it would be material for, because the filing of an application for patent is what is known as a constructive reduction to practice of the

(Testimony of David G. Lorraine.)
invention, in other words, it takes the place of the actual building of a machine and it stops the necessity for diligence, all of which questions arise on the question of carrying the date of an invention back of the filing date. If this application which is asserted to be evidenced in some manner by this uncertified paper or filing receipt didn't apply to the invention here in issue, then it is very material to the defendant's case as showing want of diligence, and the fact of what it is becomes a material factor in this case, not on the assumption of the plaintiff that they are attempting to prove something by secondary evidence. We will say that we cannot prove an alleged copy of the alleged drawings of that application without putting in the whole of it, because that is exactly what we are entitled to know. We are entitled to know whether the alleged invention here in issue was described or was claimed at that time, and that is what the issue in this case is and not something else.

MR. WESTALL: This question arose in the prior proceedings, and this Exhibit, Plaintiff's Exhibit 23, which I now offer in evidence in this record, was there received in evidence. Counsel says that the showing of that abandoned application is pertinent to defendants' case. Very well; they had all of that notice and why didn't they serve upon us a notice to produce? We didn't want it and don't want it to prove our case.

MR. F. S. LYON: Then we are objecting to it if you don't want it for your case.

(Testimony of David G. Lorraine.)

MR. WESTALL: We don't want the certified copy of the application, but we want to prove the original drawings. If it was pertinent to prove counsel's case, as he says, or for rebuttal, all they would have needed was a notice to produce and it would have been produced at this time, and after a year's notice that in the former trial we took that position counsel could in one page of typewriting have had that here if he had desired it.

MR. F. S. LYON: It is not in the possession of the plaintiff, I don't think, at the present time. If they don't rely on that application at all there is no use of encumbering the record here in this case with a lot of testimony in regard to that application or with a lot of mere piece-meal extracts alleged to be copies of parts of that application. We are entitled either to all of it in evidence or none of it. I don't care which way they take the proposition, we are entitled to a truly certified copy which is competent evidence, and a copy of that whole application so that the Court may for itself determine what that application was and whether it pertained to this invention here in issue or not. Oral testimony in regard to the contents of that document certainly is incompetent, and if it has any evidenciary purpose whatever it must be produced, duly certified. The Court in the other trial didn't admit the evidence on that theory.

THE COURT: Mr. Westall, is it competent to prove the drawings without proving your application that accompanied the drawings?

(Testimony of David G. Lorraine.)

MR. WESTALL: If we were attempting to prove the contents of that application, no, it would not be, because that would be secondary evidence. But we are not attempting to prove the contents of the application as such. What we are trying to prove is that certain original drawings were made by this witness, and that a certain disposition was made of those drawings. Those original drawings are the best evidence. It is true that certain other things were done, as for instance the filing of an application, but we are not attempting to prove that.

THE COURT: You attach no importance and do not claim any weight for the fact that an application was filed at all? You want to identify drawings which you made, and in order to identify them you want to prove that some drawings passed through the Patent Office and that this is a copy, and the fact that an application was made is of no moment to you?

MR. WESTALL: The fact that the application was made is not of any moment except as corroborating that he did do certain things with the drawings, to show what became of those drawings. The fact was those drawings were sent on to a solicitor in Washington, and they were afterwards returned. Many things may have happened to those drawings in the meantime, but that is secondary evidence.

THE COURT: Am I to understand this is to establish what a drawing which he exhibited to the other persons is?

(Testimony of David G. Lorraine.)

MR. WESTALL: Yes; what became of it, to account for its loss, and then we will prove the contents of that original drawing which was lost.

MR. F. S. LYON: Then your effort is not to prove what the drawings that were sent to the Patent Office were, if there were any drawings, but it is to prove what became of certain drawings that the plaintiff is alleged to have made and sent to some attorney; is that it?

MR. WESTALL: That is substantially it.

MR. F. S. LYON: Then this matter has nothing to do with that.

MR. WESTALL: It corroborates the witness as to dates. He remembers his dates by the fact that he did certain things with those drawings, and this original receipt of the Commissioner of Patents is certainly better evidence than the copy.

THE COURT: For that limited purpose, the objection is overruled.

MR. F. S. LYON: Note an exception.

Q BY MR. WESTALL: You have referred to certain disclosures in certain drawings that you showed to Mr. Funk in May, 1919. Please state what drawings those were and what became of them.

A It was a large drawing on white paper, just exactly like this drawing here only larger. I also showed the drawing to Mr. Campfield and Mr. Ballanfonte and several other witnesses.

MR. F. S. LYON: We object to the last statement. The witness has been handed some drawings and they

(Testimony of David G. Lorraine.)

are alleged copies of this patent application. They are not certified and not claimed to be original drawings, and it is clearly incompetent. There isn't any statement by whom these were made. They were not made, as a matter of fact, by Mr. Lorraine at all. They were made by draftsmen in Washington, and these are mere photographic copies of something that he had nothing to do with in that connection. It is an attempt, absolutely, to avoid giving the Court the true evidence in this case, and that is what that application is.

THE COURT: I don't think the application cuts any figure at all. Nothing is claimed for the application or the fact that there was an application. Counsel says it is only to identify drawings which were made at a prior time.

MR. F. S. LYON: We demand the production of the originals. It is not impossible to produce the originals of the drawings that the witness has there. They are in existence today and there is no foundation laid whatever for the introduction of copies.

THE COURT: I am not sure that there is.

MR. F. S. LYON: May I cross-examine on that question as to foundation?

THE COURT: Can you not get certified copies of your drawings?

MR. WESTALL: We are not proving those drawings. For our case I say we don't consider them of any value in proving our case. We are proving, as I said, the execution of certain original drawings shown

(Testimony of David G. Lorraine.)

to various witnesses, which were sent on to the solicitor and afterwards returned. Now what the solicitor did with those drawings doesn't make any difference. This is a photostat copy of this exhibit which is referred to, and for the sake of the record we had better have it clear that it is Plaintiff's Exhibit No. 4 on the former trial. When the patent solicitor got those original drawings he made copies of them, which were secondary evidence. Afterwards, copies of those copies were filed in the Patent Office. Now counsel is insisting that we prove a copy of a copy of a copy, while we are attempting to prove the original drawings, which is the best evidence. Counsel demands those drawings, which he says is relevant evidence on his case. If he had served a notice to produce we would have produced them, but we don't want them for our case. We don't care for them. We don't think they are competent to prove our case, the original drawings, because as I say, there is a copy of a copy of a copy.

THE COURT: If the witness can identify this drawing as being the same as that which he showed to these other witnesses he may do so and the drawing may illustrate his testimony.

MR. F. S. LYON: Note an exception.

A The drawing is the same kind of a drawing that I showed to Mr. Ballanfonte, also to Mr. Valentine, in 1915, and Mr. Fox and Mr. McCann. The only difference between this drawing and the drawing I made myself is it is a smaller drawing. It is the same kind of a drawing Mr. Funk saw.

(Testimony of David G. Lorraine.)

Q BY MR. WESTALL: You prepared drawings for the purpose of making a patent application, did you not?

MR. F. S. LYON: We object to that as leading and suggestive, and in view of counsel's statements heretofore to the Court this morning it is immaterial.

THE COURT: He may answer. It is preliminary, the application not being an important thing.

MR. F. S. LYON: An exception.

(Question read).

A Yes, sir.

Q BY MR. WESTALL: What became of those original drawings that you prepared for the purpose of making the patent application? What did you do with them after you prepared them?

A Why, I sent them to Victor J. Evans, Washington, D. C.

Q Who is Victor J. Evans?

A He is a patent solicitor in Washington.

Q What happened after you sent them on to Victor J. Evans?

A He prepared a Patent Office drawing and he sent me a copy of the Patent Office drawing.

Q Did he do that before he filed the application in the Patent Office?

A No, I think he did it afterwards. He sent me the copy afterwards, I believe.

THE COURT: Necessarily, Mr. Westall, some of that is hearsay, of course. What his attorney did he doesn't know except from what he has been told.

(Testimony of David G. Lorraine.)

Q BY MR. WESTALL: You afterwards received from Victor J. Evans a copy of the drawings that you supposed that he produced for filing in the Patent Office, did you?

MR. F. S. LYON: We object to that as clearly incompetent for any purpose.

Q BY THE COURT: Well, you received some drawings from him?

A Yes, sir; and also an application receipt for filing from the Patent Office.

Q BY MR. WESTALL: That application receipt, was that the receipt that has been offered in evidence as Plaintiff's Exhibit No. 23?

A Yes, sir.

Q Are these a photographic copy of the drawings that were filed in the Patent Office by him?

MR. F. S. LYON: We object to that on the ground it is incompetent, not the best evidence, and no foundation laid for the introduction of secondary evidence, not the proper method of proof, and as leading and calling for the conclusion of the witness, and incompetent, the witness not having qualified to answer the question.

THE COURT: Objection sustained on the ground it would be a conclusion for him to state what was filed in the Patent Office.

Q BY MR. WESTALL: I will ask this question, referring to Plaintiff's Exhibit 23: Please state where you got those drawings originally?

(Testimony of David G. Lorraine.)

MR. F. S. LYON: We object to that unless the witness is simply confined to where he received these and nothing else.

Q BY THE COURT: Did you receive those back from your attorney through the mails from Washington?

A This is a photostatic copy.

Q Whatever it is, did you receive those back from your attorney through the mails from Washington?

A No, sir.

Q You did not?

A No, sir.

Q Where did you get them?

A I got this from the California Blueprint Company here in Los Angeles.

Q BY MR. WESTALL: Will you please explain how you happened to get those drawings from the California Blueprint Company in Los Angeles?

MR F. S. LYON: We object to that unless the witness's answer is confined without conclusions or anything at all of that nature; unless it is confined to just his bare statement, it is immaterial and incompetent.

Q BY THE COURT: Did you prepare the drawing from which these were made?

A This?

Q Yes, sir.

A The one that was sent to Mr. Evans; yes sir.

Q Then he sent something back to you?

A He sent me a copy of the drawing.

(Testimony of David G. Lorraine.)

Q And what did you do with that?

A I took that to the California Blueprint Company and had copies made of that, which these are. These are photostatic prints of those copies.

Q Do you know that these are exact copies of it?

A Yes, sir.

Q What became of the one which was used to make these copies?

A It was stolen.

Q BY MR. WESTALL: What became of the original drawing that you sent on to Victor J. Evans to have that patent application prepared?

A That was stolen with it. It was pinned right on it.

Q After you had received it back from Victor J. Evans?

A Yes, sir.

Q Before you sent the drawings on to Victor J. Evans which you said were stolen did you exhibit those drawings to anyone?

A The originals?

Q Yes.

A Yes, sir.

Q To whom did you exhibit them?

A To Mr. Campfield and Mr. Funk, Mr. Ballanfonte, and Mr, Edward Pew, and several other men that I couldn't call the names of now.

Q Please explain the circumstances of the loss of the drawings which you say were stolen.

A Well, I had them—

(Testimony of David G. Lorraine.)

MR. F. S. LYON: What is that material to, your Honor?

THE COURT: Not unless you expect to dispute the fact they were stolen.

MR. F. S. LYON: I don't know that they ever existed, and I can't dispute that fact.

THE COURT: Then his answer stands as sufficient on that point.

Q BY MR. WESTALL: After the loss of those drawings what did you next do toward putting the subject-matter in practical form?

A Well, I had applied for a patent before those drawings were lost on another trap, before they were lost.

Q What patent application was that?

MR. F. S. LYON: We object to that as immaterial and incompetent.

THE COURT: Objection sustained as calling for the particulars of the application.

MR. WESTALL: We will show the Court in a moment that that is the application for the patent in suit.

MR. F. S. LYON: That is not a proper method of proving it.

MR. WESTALL: It is simply stating what he did next. If he stated, "I filed the patent application in suit", of course that would be incompetent.

THE COURT: He may answer, but the record would show the fact.

(Testimony of David G. Lorraine.)

A Before I lost the drawings, on February 5, 1920, I filed another application with Hazard & Miller here in Los Angeles for another patent.

Q BY MR. WESTALL: And that was the application for the original patent in suit, was it?

A Yes, sir.

Q The file wrapper of which has been filed?

A Yes, sir.

Q After filing that application what next did you do toward developing the idea of putting it in practical form?

MR. F. S. LYON: That is objected to as irrelevant and immaterial and not rebuttal. The constructive reduction to practice or the filing of the application for the patent in suit at least would fix his rights as of that date, so that what he did thereafter is totally immaterial and a needless waste of time, and could become material in this case only as a part of his case in chief.

THE COURT: What do you claim for that, Mr. Westall?

MR. WESTALL: It shows the development of the actual use, the making of the devices and putting them on the market and carrying the idea into effect and giving the public the benefit of it.

THE COURT: There is no dispute but what he did reduce his device and market it.

MR. F. S. LYON: No.

(Testimony of David G. Lorraine.)

Q BY MR. WESTALL: When did you cause to be made your first gas trap in accordance with the patent in suit?

MR. F. S. LYON: We object to that as not rebuttal, and as immaterial as rebuttal.

MR. WESTALL: It is showing the date of invention. It shows the time when he first—

MR. F. S. LYON: And it has already been testified to in this case, as I understand it.

THE COURT: That is not disputed, is it? What is the date?

MR. WESTALL: He started in 1919 to build the trap, and we have the Llewellyn blueprint in here as showing the date of invention back in 1919.

MR. F. S. LYON: The first trap was delivered to the Pacific Oil Company in March, 1920, by Mr. Lorraine. Is that correct?

Q BY MR. WESTALL: Is that correct, Mr. Lorraine?

A Well, the first one just exactly like that drawing we started to build in 1919, and it was delivered or we shipped it March 3, 1920.

Q BY MR. F. S. LYON: And that is the first one that was completed like that, isn't it?

A Well, just exactly like that drawing, yes.

Q That is the first trap you completed, wasn't it?

A Oh, I had built small models prior to that time.

Q You haven't any of those small models now, have you?

A No, I don't think I have.

(Testimony of David G. Lorraine.)

MR. WESTALL: Then you don't deny that that trap was sent out on March 3, 1920, do you?

MR. F. S. LYON: That is after the date of your application, and it is totally immaterial, and it wouldn't do us any good to deny it.

MR. WESTALL: We are showing the trap was paid for after the filing, but that trap was started to be built long before that time, and we have already introduced the blueprint of the Llewellyn Iron Works.

MR. F. S. LYON: You don't need to argue it now.

MR. WESTALL: I am pointing out to the Court the pertinence of making the trap.

THE COURT: He has testified when he began it and when it was completed.

Q BY MR. WESTALL: Referring to Plaintiff's Exhibit No. 34, that is a blueprint of the trap that you sold in March, isn't it, 1920?

A Yes, sir.

Q And that trap was made by the Llewellyn Iron Works?

A Yes, sir.

Q When did they commence to make that trap?

A Well, I went to them in 1918 and they told me that they were too busy on account of the war work—

MR. F. S. LYON: We object to that statement.

THE COURT: Yes; that is immaterial.

MR. F. S. LYON: And it is not responsive.

MR. WESTALL: The part as to when he went to them first is competent, I suppose.

(Testimony of David G. Lorraine.)

Q After you went to them then—or when did you go to them first?

A In 1918.

Q And did they take up the building of the trap at that time?

A Yes, they did. They told me to come around later and they would be glad to start building it, but they were busy with war work at that time. All of the shops were.

Q When did they actually start the building of the trap?

A In 1919, in November.

Q To whom did you sell that trap?

A To the Pacific Oil Company.

Q How many traps of that kind did you make before your application for reissue, July 18, 1921?

MR. F. S. LYON: That is objected to as not rebuttal. It is a part of their case in chief, if anything.

MR. WESTALL: They are testifying that they adopted a certain construction, relying upon a supposed dedication to the public, as shown in the patent. We will show that he made these traps and had them out on the market and they copied them before the patent ever issued.

MR. F. S. LYON: That would be immaterial on the question that counsel refers to, as to how many traps were made.

THE COURT: I think that is true. Sustained.

MR. WESTALL: The point is we are showing that Mr. Lorraine made a trap and put it out long be-

(Testimony of David G. Lorraine.)
fore his patent issued. Here is a pending application, and they didn't know what was in that pending application until it was issued, before the application for reissue, but the original patent was pending. The original patent was not granted until April 5, 1921. Mr. Lorraine made and put on the market traps long before that and we are contending these defendants copied those traps. They are contending that they received the first notice of the construction of the traps after the patent was issued and thought it was dedicated to the public for that reason.

MR. F. S. LYON: That is not a correct statement.

MR. WESTALL: That was the statement made:

MR. F. S. LYON: The facts that counsel refers to are absolutely immaterial to our contention of intervening rights. Our contention of intervening rights is that almost immediately upon the issuance of the Lorraine original patent we secured a copy of it, inspected it, found, and were advised by counsel, that we did not infringe any of its claims, and it is admitted here that we didn't, and that then we put out the very traps that they now assert are infringements, and that we accepted their patent, their original patent, for its face value, and that we did not infringe upon the original patent, and that they cannot by reissue cut out anything that we did between the date of their original issuance of their patent and the date of their application for the reissue. That hasn't anything to do with what Mr. Lorraine was doing in the manufacture

(Testimony of David G. Lorraine.)
or selling of traps. That is a part of the prima facie case and has nothing to do with our defense whatever.

MR. WESTALL: That is not the fact, your Honor. If Mr. Lorraine made and put on the market a trap and they saw and copied the trap it is pretty strong evidence, and it shows conclusively they did not take our patent and read it over and find out what it was and then adopt a construction with the idea that it was a dedication to the public. Between the granting of the original and the application for the re-issue there were only a few days intervened.

MR. F. S. LYON: February to July.

MR. WESTALL: It is less than that, as I will show when we come to argue it. I will show it was about a month.

THE COURT: I will let him answer and you may argue the question.

MR. F. S. LYON: Note an exception.

A What is the question?

(Question read).

MR. F. S. LYON: That is the date of the application for reissue, your Honor, and not the date of the issuance of the original patent even.

A I made five.

Q BY MR. WESTALL: When did you make those five traps?

MR. F. S. LYON: The same objection.

THE COURT: The same ruling.

MR. F. S. LYON: An exception.

(Testimony of David G. Lorraine.)

A We started to build them in 1920 and we completed them in 1921.

Q BY MR. WESTALL: Did you ever see the old Trumble trap in operation prior to the time you made your application for the original patent?

A Yes, sir.

Q And what opportunity did you have for observing the operation of the old Trumble trap subsequent to that time?

A I had an excellent opportunity to observe the operation. I could see the oil going into the discharge or into the production tanks. I could see how it separated gas and oil and how it failed to separate the gas and the oil.

Q How many of those traps did you have an opportunity to observe?

A Well, I wouldn't like to state the exact number, but I observed some very carefully and watched some of them very closely, such as those up north there at Taft and out here at Brea Canyon and Richfield. There were several of them.

Q How many would you say of the old Trumble traps you had observed the operation of up to the time of this trial?

A Oh, perhaps 200.

Q Did you notice the oil level carried by those old traps at the time you observed them?

A Yes, sir.

Q Where did you find the oil level in those old traps at the time you observed them?

(Testimony of David G. Lorraine.)

A Well, the traps that I watched very closely—I watched them sometimes for an hour at a time, and I never saw the old traps maintain an oil level at any particular level. Sometimes it would be two inches in the glass, sometimes three inches in the glass, and sometimes out of sight. It never kept an even level of oil.

Q When the level was out of sight what condition prevailed in regard to the operation of the trap?

A Well, the gas trap as a rule would not be performing any function at all so far as saving any gas or anything like that was concerned. The gas and the oil would be going right into the oil tank.

Q When the Trumble traps were operating according to their design satisfactorily, normally, say, where was the oil level according to your observation?

MR. F. S. LYON: We object to that, as the question has already been asked and answered by the witness.

THE COURT: I think so, but you may answer it again.

MR. WESTALL: I think, your Honor, I have included certain matters in this question that were not touched upon by the witness.

THE COURT: Proceed.

MR. F. S. LYON: Let's have the question read.

(Question read).

THE COURT: You may answer.

(Testimony of David G. Lorraine.)

A It ranged from two to four inches in the glass, and I did see one six inches in the glass, that held a fairly normal level.

Q BY MR. WESTALL: Did you ever see a trap made by defendants so adjusted and arranged that during its normal average operation it carried the oil level above the top of the gage glass?

MR. F. S. LYON: We object to that as leading and suggestive, and furthermore on the ground that it is putting the words right in the mouth of the witness.

THE COURT: He may answer as to whether he had ever seen any with the oil above the top of the glass.

MR. F. S. LYON: Note an exception.

A Yes, I saw a trap like that. They were putting oil into the gas line, and I replaced that trap for the General Petroleum Company. I replaced it with one of our traps.

Q BY MR. WESTALL: What well and what trap?

A That was on Tonner No. 3; and also on Tonner No. 1 I saw the trap do the same thing, where it filled the absorption plant full of oil.

Q What is the purpose of a gage glass on a trap?

A To tell where the oil level is; to indicate the oil level.

THE COURT: Matters of that kind I think have been thoroughly proved, Mr. Westall, and it is a waste of time.

(Testimony of David G. Lorraine.)

MR. WESTALL: I think so, too, your Honor. I think that is a fact.

Q Now regarding other means of determining the level of the oil, is there any other manner in which you can ascertain the level of oil in a trap other than the gage glass?

A Why, yes; you could have try-cocks, or small cocks, which are nothing but small valves, to indicate the level.

Q Some of your new traps are equipped with that means, are they not?

A Yes, sir; all of them are.

Q Please state whether there are any other means of determining the level other than the gage glass and the cocks, that is, accurately determining the level.

A Well, on these traps that have a large float in them, something that has buoyancy in them, you can determine the oil level, but in the old traps there was no way of indicating the oil level only by try-cocks or a gage glass, because the float was so small and so uncertain in action in all the old type float traps that they couldn't tell anything about it by the float arm, because I have found the float arm in a horizontal position in the old Trumble traps and gas and oil both going right out the oil line. I have found it overflowing with oil and still the float arm was in the same position. You couldn't tell anything by the float arm in the old style traps.

Q Why was that?

(Testimony of David G. Lorraine.)

A The valve might stick or a packing might bind the arm. There were several reasons.

Q And the float arm might be bent down or up, might it not?

MR. F. S. LYON: We object to that as leading and suggestive.

THE COURT: It is leading.

Q BY MR. WESTALL: Well, then complete your answer.

A There were several reasons. The float-arm might be loose on the rock-shaft and be hanging away down in the trap, or it might be away up, and it might have lost motion in it.

Q What effect would the submergence of the float have in the oil? Were there different degrees of submergence in normal operation?

A Oh, yes. The oil would have a great deal to do with that, with the different gravities of oil. The float would submerge more in some oils than it would in others, but as a rule they figure to get about one-third or half of the float submerged.

Q Did they have any means for altering that degree of submergence or assuring that it would remain that way?

A No, they had no assurance of it remaining that way. Sometimes they would put weights on the float arm lever on the outside to balance it up.

Q That was the purpose—or what did they do that for?

A So that the float would have more power to open the valve.

(Testimony of David G. Lorraine.)

Q I wish you would compare the oil level of the old Trumble trap with the oil level of the new Trumble trap, referring particularly to Plaintiff's Exhibit 26 and Defendant's Exhibit YY.

MR. F. S. LYON: We object to that on the ground that the witness has already on direct been over this matter. He testified in regard to this oil level question and used Plaintiff's Exhibit 26, and has been over the whole subject-matter before, and it is not rebuttal.

MR. WESTALL: They are claiming that traps made like Exhibit YY are anticipations, that they anticipate the idea of these claims. Now if the Court please, the purpose of the question is to show that they do not operate in the same manner nor produce the same result as specified by our claims. It is rebuttal to the evidence on anticipation.

THE COURT: I will let him answer.

MR. F. S. LYON: Note an exception.

A In the old Trumble trap there is a different kind of a valve. This valve would open much quicker in the old type of trap than it would in the new type of trap. A very small movement of the float in the old trap would open the Klipfel valve.

MR. F. S. LYON: We object to the answer so far given as not responsive to the question and move to strike it from the record.

THE COURT: It may be stricken out.

MR. WESTALL: Just read the question again.

(Question read).

(Testimony of David G. Lorraine.)

MR. WESTALL: I think, your Honor, that the sentence of the witness is preliminary to an explanation of the controlling features which regulated the oil level.

THE COURT: You just asked him for the difference in the oil level. He can state that briefly and quickly, as to whether there was a difference and what it was, and that is all there is to it, between the old and the one that represents the new design.

A Well, there is a large difference between the uniform volume in the level of oil maintained in this new trap and in this old style trap.

THE COURT: What is the difference, is the question.

A The new trap would hold at least a third more oil.

THE COURT: That is an answer.

Q BY MR. WESTALL: And was the old trap adapted to maintain a uniform volume and level of oil at a point above the vertical center of the receptacle?

MR. F. S. LYON: We object to that question as leading and suggestive.

THE COURT: And I think he has already testified as to what he calls the low level trap, as to where the oil was. He testified where he found it in the glass, and as to those things.

MR. WESTALL: He found it in the glass, but I want to find out the possibility of using the device to maintain the level.

(Testimony of David G. Lorraine.)

Q BY THE COURT: I will ask you, in the low level Trumble traps how high you ever observed the oil stand in relation to the height of the cylinder at any time.

MR. WESTALL: Of course, your Honor, that is not exactly the question, in this way: We are going to take the position it may be under the old traps that the level would occasionally rise.

Q BY THE COURT: I am not speaking of the occasional or spasmodic action. He has said he observed one going over the top. That is one. I mean in general use and as they were used, how high up on the cylinder was the level of the oil on the old Trumble traps.

A From the lower rivet line of the cylindrical shell was from six to eight inches, and it would be from two to four inches in the glass.

Q BY THE COURT: That would be about what proportion of the total height of the shell?

A Of the cylindrical shell that would be about one-sixth of the shell, less than one-sixth.

THE COURT: That is an answer.

Q BY MR. WESTALL: With regard to the new Trumble trap as illustrated in the exhibit before you, Plaintiff's Exhibit No. 26, please answer the same question.

A The oil level would be approximately four feet from the lower rivet line to the normal height where you would get the best results out of it.

(Testimony of David G. Lorraine.)

Q Would it fluctuate in the construction last referred to in the late Trumble traps?

MR. F. S. LYON: We object to that as not rebuttal and as wholly gone over by the witness.

Q BY THE COURT: Can you tell upon the late Trumble traps what the ordinary range of level was?

A A very small fluctuation. I observed out in Brea Canyon the first one I saw with a high oil level, and the oil level remained very constant above the vertical center of the trap.

Q By MR. WESTALL: Reference has been made to certain domes on the tops of traps made by you at the present time. What are the dimensions of any such extensions?

A Why, they range all the way from four inches high and seventeen inches in diameter to nineteen inches in diameter and thirty-six inches high. That is merely a manhole plate and a dome combined.

Q And what size of dome are you putting on at the present time, or have you been putting on recently?

A Seventeen inches in diameter and four inches high.

MR. WESTALL: I believe that is all.

CROSS EXAMINATION

BY MR. F. S. LYON:

Q What difference in the mode of operating or separating oil from gas in an oil well would it make, Mr. Lorraine, in a Trumble trap such as, for instance, illustrated in Plaintiff's Exhibit 26 if the top of the shell were continued up eight feet more and the cones,

(Testimony of David G. Lorraine.)
inlet pipe and outlet pipes put on the top, with the float and valve mechanism and oil outlet remaining the same?

A Well, I can't answer that question with a mere yes or no. I have made several tests.

Q I asked you what difference in the mode of operation such a change would make.

A Well, it would make an extra investment.

Q In other words, you would have more trap?

A You would have more cost to the trap. It would cost you more to build it.

Q That wouldn't make any difference in the mode of operation of the trap, would it?

A Well, there wouldn't be any sense in building it that way unless you took advantage of the capacity.

Q Would it make any difference in the mode of operation?

A It would if you moved that oil level up to the vertical center.

Q Did I ask you anything about moving the oil level in any manner in my question?

A No, sir.

Q It would make no difference in the mode of operation, would it, to simply extend the height of the trap as indicated in my question?

A Well, it wouldn't make any difference in the mode of operation, but it would make a difference in the expense of the trap you would not be utilizing.

Q In other words, you would have a bigger trap with a bigger gas collection chamber and that is all,

(Testimony of David G. Lorraine.)

and you wouldn't need as big a gas collection chamber as that, would you?

A No. That is the advantage of running your oil level above the vertical center.

MR. F. S. LYON: That is all.

MR. WESTALL: That is all.

(A recess was thereupon taken until two o'clock p. m.).

AFTERNOON SESSION.

2 o'clock.

THE COURT: Proceed, Mr. Westall.

MR. WESTALL: If the Court please, at the last session, I believe through inadvertence, we did not offer in evidence these drawings referred to by the witness, Plaintiff's Exhibit No. 4 on the former trial. We now offer them in evidence as the same number of exhibit.

MR. F. S. LYON: We object to the offer as incompetent, no foundation laid; as not the best evidence, and no foundation laid for the introduction of secondary evidence; and as irrelevant and immaterial.

THE COURT: The objection is overruled.

MR. F. S. LYON: Exception.

MR. WESTALL: I would like to call Mr. Morgan for one or two questions, after which we are through with our rebuttal.

THE COURT: Very well.

(Testimony of Thomas F. Morgan.)

THOMAS F. MORGAN,

recalled on behalf of the Plaintiff, in rebuttal.

DIRECT EXAMINATION

BY MR. WESTALL:

Q Mr. Morgan, were you employed in this case to testify as an expert?

A I was employed to—I don't know. There was no discussion about being an expert; no, sir.

Q You were specially employed, however, as a witness to gather certain data and to testify for the defendants, were you not?

A I was employed to gather data, yes, sir.

Q And were specially compensated for that work?

A There has been no discussion as to compensation.

Q Well, was it understood you would be paid for the time you have put in on the case?

A Surely.

Q How much time have you put in on the case all together?

A I can't tell you at this time.

Q Did you spend considerable time on the case before the trial?

A I spent some time; yes, sir.

Q You understand that you are to be specially paid for all that work?

A Yes, sir.

Q. At what rate of compensation?

A That has not been decided upon.

Q Well, at the usual rate that they pay experts? Has that been talked about?

(Testimony of Thomas F. Morgan.)

A There has been no discussion. I don't know what they usually pay experts, Mr. Westall.

MR. WESTALL: That is all.

MR. F. S. LYON: No questions.

MR. WESTALL: Plaintiff rests.

THOMAS F. MORGAN,

recalled on behalf of the Defendants, in sur-rebuttal, testified as follows:

DIRECT EXAMINATION

BY MR. F. S. LYON:

Q You heard some testimony in regard to drips upon the lines of Chapman Well No. 1, I think, in particular. Do you recognize to what I refer?

A You mean on the gas lines?

Q Yes.

A Yes, sir; there were drips there.

Q What have you to say in regard to such drips being generally used or being exceptional in and on gas lines?

A Well, we installed them on all our gas lines.

Q Would that depend upon whether you had a gas trap on the line or not?

A We have installed them on lines there were no gas traps on.

Q And on lines from wells that were only making gas?

A Well, I don't believe we had a well that was making gas only, during my time, but we did install

(Testimony of Thomas F. Morgan.)

them on lines between, say, the Hole lease and the Brea refinery.

Q That was on the gas line?

A That was on the gas line, after it left the absorption plant.

MR. F. S. LYON: That is all.

CROSS EXAMINATION

BY MR. WESTALL:

Q Mr. Morgan, are you interested in any way in this litigation other than in payment for your services?

A No, sir. Well, in what way do you mean?

Q Do you own any interest in the gas trap business?

A No, sir.

Q Are you employed by the Trumble Gas Trap Company, that is, in any other employment than in connection with the getting of evidence?

A No, sir.

MR. WESTALL: That is all.

Q BY MR. F. S. LYON: Your employment that you have referred to in this case was a request to collect the witnesses and the evidence in regard to these old Chapman wells and traps and the Hole lease traps, that you personally had knowledge of and superintended the use of, wasn't it?

A Yes, sir.

Q And were you employed in any other respect in this case?

A No, sir.

MR. F. S. LYON: That is all.

(Testimony of Paul Paine.)

Q BY MR. WESTALL: It is a fact, is it not, that you own stock in the Brown Valve Company which supplies valves for the Trumble traps?

A No, sir; I do not.

Q You own no interest in any company supplying parts for the Trumble trap?

A No, sir.

MR. WESTALL: That is all.

PAUL PAINE,

recalled on behalf of the Defendants, in sur-rebuttal, testified as follows:

DIRECT EXAMINATION

BY MR. F. S. LYON:

Q Mr. Paine, you have heard the testimony of plaintiff's witnesses in regard to drips on gas lines in connection with Trumble traps, have you?

A Yes, sir.

Q What are such drips used for in the oil fields?

A They are installed on gas lines for the purpose of collecting any liquids or solid materials which may be in the gas.

Q To what extent are they so used?

A Their installation is standard practice on all gas lines, I would say, and in fact they are installed, so far as I know, in every case on gas lines which are carrying so-called dry gas—gas obtained from dry gas wells; because in any case a certain amount of dirt accumulates on the inside of the pipe, and even with

(Testimony of Paul Paine.)

the so-called dry gas there is more or less vapor, or gasolene vapor, which becomes condensed at times and must be separated from the gas, and therefore these drips are installed on all gas lines.

Q That condensation of vapor has been found in connection with the natural gas pipe lines in actual service, has it not?

A Oh, yes.

Q And it is a common thing in the natural gas lines to have drips and means for withdrawing the contents say at divers points along the pipe line system?

A Invariably.

Q Now you heard the testimony of one or more of the plaintiff's witnesses in which they were asked what attention, if any, you gave to the early Trumble traps on the Honolulu Consolidated lease. Please state what attention and why you gave any particular attention to such traps.

A Why, I can't—

MR. WESTALL: If your Honor please, we object to that as not proper sur-rebuttal testimony. I think it has already been covered.

THE COURT: I hardly think it is. Mr. Paine went over all the matters showing what attention he did pay to it and what he observed.

MR. F. S. LYON: Well, if the Court remembers Mr. Paine's reasons for that, I was not aware that he had gone fully into it, and there is only one question and answer to that.

(Testimony of Paul Paine.)

THE COURT: Referring, then, to the testimony given as to the attention that he did pay to it, he can give his reason for it.

MR. F. S. LYON: That is all I want, the reason.

A The reason for marking particularly the behavior of these traps lay in the fact that they were new to us and were extremely valuable in their application. The Trumble trap at that time, namely, early in 1915, provided the most effective means of meeting the problem of separating and saving the gas which occurred along with the oil, and since this trap also provided a flexibility as to operating conditions a wide use for it was apparent, and so I observed it with a great deal of interest and made extensive tests with the earlier traps.

MR. F. S. LYON: That is all.

MR. WESTALL: That is all.

MR. F. S. LYON: Defendants rest.

THE COURT: What do you gentlemen want to do about the argument?

MR. WESTALL: We are ready to argue it now.

THE COURT: You may proceed.

[ENDORSED]: IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. Hon. William P. James, Judge Presiding.

DAVID G. LORRAINE et al, Plaintiffs, -v- FRANCIS M. TOWNSEND et al, Defendants. No. F-80 in Equity.

REPORTER'S TRANSCRIPT.

Los Angeles, California, May 14, 1924.

Filed May 28 1924 CHAS. N. WILLIAMS, Clerk By Murray E. Wire Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

DAVID G. LORRAINE, et al.,) In Equity No. F-80.
Plaintiffs,)
vs.) OPINION.
FRANCIS M. TOWNSEND, et al.,)
Defendants.)
..............................)

Westall and Wallace: Attorneys for Plaintiffs.

Lyon & Lyon; Frank L. A. Graham: Attorneys for Defendants.

Plaintiffs allege infringement of Claims 17, 18 and 19 of Patent No. 1,373,664, issued April 5, 1921, and Reissue No. 15,220 of November 8, 1921. The patent covers a device or mechanical contrivance by which gas may be separated from oil delivered from a producing well. Defendants have such a device, which they claim is protected by Patent No. 1,269,134, dated June 11, 1918, issued to M. J. Trumble. Plaintiffs contend that a form of the defendants' device, differing from that described in the Trumble patent, is being manufactured by defendants and that it is an infringement.

It is now a matter of common knowledge that in the production of oil from wells sunk into the ground

there is generally an accompaniment of gas. This gas, if not collected by some means, will escape into the air and be lost. Various methods had for many years, long prior to the date of the patent of either the plaintiffs or the defendants, been employed for the purpose of collecting the gas and retaining it in some receptacle under pressure, from which receptacle it might be conducted by pipes and used for heating or illumination. It is a matter of quite common knowledge that oil producers early used the well casing as a container, employing a packer around the pumping tube to prevent the escape of the gas and then conducting it through pipes to boilers, and for other uses.

In view of the well-known practices in that regard at the time the plaintiffs and defendants brought their devices forward, there was no novelty at all in the mere construction of a metal reservoir into which both the oil and gas, emitted from a well, would be delivered. the gas being collected in the upper portion of the chamber, the oil collecting and passing out from the lower portion thereof. It was determined, however, that in addition to the free gas emerging from a well, the oil itself contained such highly volatile constituents as would show a tendency to vaporize more or less freely under varying conditions, dependent upon the manipulation thereof. It is well known that the transformation of such constituents is heightened by the application of heat and the releasing of pressure. Gasoline producers have reversed the process and have

taken natural gas from oil wells, subjected it to high pressure, reduced its temperature by refrigeration, and, as a result, precipitated it in the form of gasoline.

In the field of invention entered by the plaintiffs and defendants, the main problem was to increase the volume of gas produced by a well, by both saving and collecting the gas that came in clear form from the well and stimulating the separation of more gas from the liquid petroleum. The latter result, so far as it was accomplished by either the device of the plaintiffs or that of the defendants, depended upon the manner in which the oil and gas entered the receptacle from the well, and the manner in which the oil was held and distributed inside such receptacle. Heat was designed to be applied through a steam coil by Trumble, but it was not a part of the plaintiffs' apparatus; hence the presence or lack of heating appliance is not a question here.

Bray, as described in Patent No. 1,014,943, dated January 16, 1912, had designed a gas trap which consisted of a large metallic container, the equivalent, so far as the general idea of a container is concerned, to that found in both the plaintiffs' and the Trumble patents. Bray distributed the incoming oil over perforated conical plates installed in the upper part of his container, there being three in number, one underneath the other. He seems to have considered that it was desirable to break up the oil as an aid to the separation of the gas and for that purpose perforated

his conical sections, so as to permit the dripping of the fluid. The Bray patent was cited in a suit between the same parties as here appear, wherein it was contended by these defendants that their patent had been infringed in certain of its claims by the device manufactured under Lorraine's reissue.

See Lorraine (appellant) vs. Townsend, et al., 290 Fed. 54.

A reading of that decision, with the citations made in it, shows that the court considered the inventive field a narrow one. Lorraine included in his device two features different from those which had preceded him in that he fed his oil and gas mixture into a chamber built within the main container, walling this chamber off and attaching it to one side of the enclosing cylinder. The inner chamber opened into the main inner receptacle at the top, the lower end of its inner wall being designed to be kept submerged in the oil contained in the main receptacle. He applied, too, a synchronized valve connection attachment of his own invention, the valve being placed outside the receptacle. As the float within the chamber rose or fell with the liquid surface of the oil contained therein, the oil outlet would open or close and the gas outlet would operate in the reverse. A feature of the device of both parties was to increase the gas pressure in the upper part of the chamber as the liquid contents ascended, one function of this pressure being to expel the oil more rapidly. That feature was not new. It was

used by Bray before it had been used by either of these parties, as well as Cooper in 1916. The synchronized valve as a separate thing, it seems to be conceded, is entitled to a claim for originality, but it is not made use of in the Trumble apparatus.

Because the owners of the Trumble patent, at a date subsequent to the issuance of the Lorraine patent, cut out the lower baffle plates and adjusted their float so that a higher level of oil might be maintained within the cylinder, Lorraine insists that infringement has resulted. He claims equivalency for his segmented chamber in the additional space provided by the cutting out of the Lorraine baffles. He claims that the raising of the oil level to a mean height within the container adopts his inventive idea. In view of what has been said regarding the state of the art in this field, it is plain enough that, so far as arrangement of the interior chamber is concerned, without his segmented compartment Lorraine's device would disclose no originality. The addition of his compartment, as is true also of the baffle plates of Trumble, marks but a small advance over devices well known and in prior use. This first claim of Lorraine's. therefore, should be dismissed as without merit.

If the second claim—that the raising of the height of the oil in the receiving chamber worked such a great improvement in gas traps as to indicate inventive novelty—is upheld, that conclusion must be declared in the face of the fact that neither singly nor collect-

ively are any different adjuncts required in raising the oil level than at all times have been parts of the Trumble assemblage. In operating the trap, the liquid is required to be drawn off through an aperture at the bottom or side of the receptacle. The float in the inner chamber, operating upon the outlet valve, opens or closes it as the liquid rises or falls. This feature is common to Trumble, Lorraine and other preceding patents. The gas is carried out at the top or roof of the receptacle, but if the fall of the liquid is so great as that the level reaches the line of the outlet, the gas will blow out and mingle with the oil until the liquid level again rises to seal it. To guard against the latter contingency, the common expedient which would occur to the mind of any intelligent observer would be to raise the oil level by arranging the float device so that the oil outlet valve would close before the fluid level fell far enough to allow the gas to blow out. It can easily be seen that the second claim of Lorraine involves only a matter of adjustment and not of novelty of device. And it was clearly shown by the evidence that the most successful operation of a gas trap, as to the particular last discussed, does not depend upon the oil being carried at about the middle of the receptacle or at any particular or specific height. In its practical working the height of the receptacle may be extended and leave the oil level far below the middle line. And this is equally true of either the Lorraine or Trumble device.

I have not considered it necessary to enter into a discussion of the functions of the segmented chamber of Lorraine, as compared with the baffle plates of Trumble. The feature of pressure maintained within the chamber is common to both, and not a matter involving a new idea. This is plainly pointed out in Lorraine vs. Townsend, supra. Within the narrow limits left by a very much occupied field, I think that the segmented chamber and its arrangement in connection with the gas separation device is the only thing, aside from the synchronized valve, that may be said to entitle the Lorraine patent to a claim of validity.

I find that the charge of infringement is not sustained.

The decree will therefore be for the defendants and will include costs in their favor.

Dated this 20 day of December, 1924.

Wm. P. James,

District Judge.

(Endorsement) No. F 80 Eq

U. S District Court SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION DAVID G LORRAINE et al Plaintiffs vs. FRANCIS M TOWNSEND et al Defendants OPINION FILED Dec 20, 1924 CHAS. N. WILLIAMS Clerk By Murray E Wire Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

DAVID G. LORRAINE and THE LORRAINE CORPORATION, a corporation,

Plaintiffs,

vs. — In Equity F-80 J

FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY,

Defendants.

PETITION FOR APPEAL

TO THE HONORABLE WILLIAM P. JAMES,

United States District Judge:

The above-named plaintiffs feeling aggrieved by the decree rendered and entered in the above entitled cause on the 2nd day of January, 1925, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith and pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, papers, and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for

the Ninth Circuit under the Rules of such court in such cases made and provided; and your petitioners further pray that the proper order relating to the security to be required of them be made, and the same to act as a supersedeas.

DAVID G. LORRAINE
THE LORRAINE CORPORATION
BY WESTALL AND WALLACE,
By Joseph F Westall
Solicitors and of counsel for
Plaintiffs.

(Endorsement) No F-80 J Equity In the District Court of the United States in and for the Southern District of California SOUTHERN DIVISION DAVID G LORRAINE et al Complainants vs FRANCIS M TOWNSEND et al Defendants PETITION FOR APPEAL Received copy of the within Petition for Appeal this 13th day of January 1925 Lyon & Lyon Henry S Richmond Frank L A Graham Attorney for Defendants FILED JAN 14, 1925. CHAS. N. WILLIAMS Clerk By R S Zimmerman Deputy Clerk WESTALL and WALLACE Patent Attorneys Suite 611 California Bank Building 629 South Spring Street Los Angeles, Cal. Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

DAVID G. LORRAINE and THE LORRAINE CORPORATION, a corporation,

Plaintiffs,

vs. In Equity F-80 J

FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY,

Defendants.

ASSIGNMENT OF ERRORS

Now comes the above named plaintiffs, David G. Lorraine and The Lorraine Corporation, a corporation, and files the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause, from the decree entered and recorded January 2, 1925, by this Honorable Court, ordering, adjudging, and decreeing that plaintiffs' Bill of Complaint and plaintiffs' Supplemental Bill of Complaint be dismissed:

That the United States District Court for the Southern Division of the Southern District of California, erred

I.

In decreeing that the bill of complaint and supplemental bill of complaint and each of them be dismissed.

II.

In decreeing that defendants have judgment against plaintiffs and each of them for defendants' costs and disbursements incurred in the above entitled cause.

III.

In failing to find and decree that Reissued Letters Patent No. 15220, granted to David G. Lorraine, November 8, 1921, for Oil, Gas and Sand Separators, are good and valid in law as to all claims involved in this suit, namely, claims 17, 18, and 19 thereof.

IV.

In failing to find and decree that claims 17, 18, and 19 of said Reissued Letters Patent No. 15,220, granted to the said David G. Lorraine, were prior to the filing of the bill of complaint and prior to the filing of the supplemental bill of complaint infringed by said defendants who threatened to continue and were at all times as charged in said bill and supplemental bill of complaint continuing to infringe the same.

V.

In finding or intimating that said claims 17, 18, and 19 of said Reissued Letters Patent No. 15,220, were void for want of invention over the prior art and particularly were void for want of invention over Letters Patent No. 1,269,134, granted June 11, 1918, to M. J.

Trumble for Crude Petroleum and Natural Gas Separator.

VI

In finding that without the segmented compartment in the device of said Letters Patent No. 15,220, said device would disclose no originality

VII.

In finding or intimating that the receiving chamber of the claims in suit added to other elements of said claims marked but a small advance in the art; and in intimating that the claim or claims were without merit because of such small advance in the art.

VIII.

In finding or intimating that neither singly nor collectively are any different adjuncts required in raising the oil level than at all times have been part of the Trumble Assembly.

IX.

In finding or intimating that raising the oil level in the device of said Trumble Patent and making the necessary changes in the device to enable such level to be raised and maintained was a common expedient and would occur to any intelligent observer; in face of the uncontroverted evidence that such expedient did not occur to even inventive genius for years after the grant of said Trumble patent, and was first disclosed to the world by the Reissued Letters Patent in suit.

X.

In finding or intimating that the second claim of the Lorraine Reissued Patent in suit (probably the

court meant claim 18) involved only a matter of adjustment and not novelty of the device.

XI.

In finding or intimating that the construction of a device which permits adjustment for improved operation may not involve novelty.

XII.

In finding or intimating that the high oil level or volume of oil in such devices as those in suit does not lead to successful operation.

XIII.

In finding or intimating that in practical work the height of the receptacle may be extended (for any purpose other than evasion) so that the oil level may be left below the middle line.

XIV.

In not comparing the functions of the segmented chamber of the Lorraine Reissue Patent in suit with the chamber above the baffle plate of the device of defendants and in not finding upon such comparison that the chambers were mechanical equivalents of each other and in not finding that each and every of the other elements of each of the claims in suit were also found in defendants' devices and that consequently defendants' devices infringed the claims in suit.

XV.

In finding or intimating that the fact of pressure within the chambers was part of the claims or involved in this suit.

XVI.

After finding that the segmented chamber of the Lorraine Patent in suit and its arrangement in connection with the gas separation device was novel and entitled plaintiffs to a finding of validity of the patent in suit, in failing to find and decree said Letters and said claims in suit all involving as they do these elements of novelty were valid in law and infringed.

XVII.

In finding that the charge of infringement has not been sustained.

WHEREFORE the appellants pray that said decree be reversed and that said District Court of the Southern Division for the Southern District of California be ordered to enter a decree reversing the decision appealed from and entering a decree in favor of plaintiffs in this cause as prayed in the bill of complaint and supplemental bill of complaint.

DAVID G. LORRAINE
THE LORRAINE CORPORATION
By WESTALL AND WALLACE,
By Joseph F Westall
Solicitors and of counsel for
Plaintiffs.

(Endorsement) No Equity F-80 J In The District Court of the United States in and for the Southern District of California SOUTHERN DIVISION DAVID G. LORRAINE et al Complainants vs FRANCIS M TOWNSEND et al Defendant*a* ASSIGNMENT

OF ERRORS Received copy of the within assignment this 13th day of January, 1925 Lyon & Lyon Henry S Richmond Frank L A Graham Attorney for Defendants FILED JAN 14, 1925 CHAS. N. WILLIAMS Clerk By R S Zimmerman Deputy Clerk WESTALL & WALLACE, Patent Attorneys, Suite 611 California Bank Building 629 South Spring Street Los Angeles, Cal. Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

DAVID G. LORRAINE and THE LORRAINE CORPORATION, a corporation,

Plaintiffs,

vs.) In Equity No. F-80 J

FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY,

Defendants.

ORDER ALLOWING APPEAL

On motion of Joseph F. Westall, Esq., of the firm of WESTALL AND WALLACE, solicitors and of counsel for the above-named plaintiffs, it is hereby ordered that an appeal to the United States Circuit

Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein on the 2nd day of January, 1925, may, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit. It is further ordered that the bond on appeal be fixed in the sum of Two Thousand ($2000.00) dollars the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated this 14 day of January, 1925.

Wm P James

U. S. District Judge.

APPROVED AS TO FORM AS PROVIDED IN RULE 45.

Frederick S Lyon

Attorneys for Defendants.

(Endorsement) No F-80 J Equity In The District Court of the United States in and for the Southern District of California Southern Division David G Lorraine et al Complainants vs Francis M Townsend et al Defendants Order Allowing Appeal FILED JAN 14, 1925 CHAS. N. WILLIAMS Clerk By R S Zimmerman Deputy Clerk WESTALL and WALLACE Patent Attorneys Suite 611 California Bank Building 629 South Spring Street Los Angeles Cal. Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

3203406

DAVID G. LORRAINE and THE LORRAINE CORPORATION, a corporation,

Plaintiffs,

vs. In Equity F-80 J

FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY,

Defendants.

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, David G. Lorraine and The Lorraine Corporation, a corporation organized and existing under and by virtue of the laws of the State of Nevada, as principals, and Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, and duly licensed to transact business in the State of California, having complied with the laws of the State of California and with the Statutes of the United States, particularly with the Act of August 13, 1894, as amended by the Act of March 23, 1910 of the United States

and with the rules of the above-entitled court, as surety, are jointly and severally held and firmly bound unto Francis M. Townsend. Milon J. Trumble and Alfred J. Gutzler, and to them jointly and severally, in the penal sum of Two Thousand ($2,000.00) Dollars, to be paid to them and their respective executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals and dated this 14th day of January, 1925.

WHEREAS, the above-named David G. Lorraine and The Lorraine Corporation have taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree made, rendered, and entered on the 2nd day of January, 1925, in the District Court of the United States for the Southern District of California, Southern Division, in the above-entitled cause, dismissing plaintiffs' bill of complaint and supplemental bill of complaint awarding judgment in the sum of TWELVE HUNDRED AND ONE DOLLARS AND NINETY NINE CENTS ($1201.99) against plaintiffs for defendants' costs.

AND WHEREAS, said District Court of the United States for the Southern District of California, Southern Division, has fixed the amount of plaintiffs' bond on said appeal (the same to operate as a supersedeas) in the sum of TWO THOUSAND ($2,000.00) DOLLARS;

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiffs shall prosecute their said appeal, and any appeal allowed to be taken to the Supreme Court of the United States to effect, and answer all damages and costs awarded against them if they fail to make their plea good including just damages for delay costs and interest, then this obligation shall be void; otherwise to remain in full force and effect.

ATTEST: THE LORRAINE CORPORATION
W B Summers By David G. Lorraine
Its Secretary Its President.
David G. Lorraine
(Seal) PRINCIPALS.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By W. M. Walker
Attorney-in-Fact.
S M Smith
Agent.

STATE OF CALIFORNIA)
(ss
County of Los Angeles)

On this 14th day of January 1925, before me Mary C. Fausony a Notary Public in and for the County and State aforesaid, duly commissioned and sworn personally appeared W. M. Walker and S. M. Smith known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent, respectively, of the Fidelity and Deposit Company of Maryland, and acknowledged to

me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-fact and Agent respectively.

Mary C. Fausony
Notary Public in and for the State of California County of Los Angeles.

(Seal)

The premium for this bond is $20.00 per annum.

Examined and recommended for Approval, as provided in Rule 29.

WESTALL AND WALLACE,
By Joseph F Westall
Solicitors and of Counsel for Plaintiffs.

I hereby approve the foregoing bond this 16 day of January, 1925.

Wm P James
United States District Judge.

(Endorsement) No. Equity F-80 J In the District Court of the United States in and for the Southern District of California SOUTHERN DIVISION DAVID G. LORRAINE et al Complainants vs FRANCIS M. TOWNSEND et al., Defendants BOND ON APPEAL

FILED JAN 16, 1925 CHAS. N. WILLIAMS Clerk By R S Zimmerman Deputy Clerk WESTALL and WALLACE Patent Attorneys Suite 611 California Bank Building 629 South Spring Street Los Angeles, Cal. Attorneys for Plaintiffs.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

DAVID G. LORRAINE and THE LORRAINE CORPORATION, a corporation,
Plaintiffs,
vs.
FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY,
Defendants.

In Equity No. F-80-J

STIPULATION RE TRANSCRIPT OF RECORD ON APPEAL AND EXHIBITS.

The above-named plaintiffs having taken an appeal in this suit to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree entered on the 2nd day of January, 1925;

IT IS HEREBY STIPULATED AND AGREED SUBJECT TO THE APPROVAL OF THE COURT:

Both parties to this suit so desiring, the provisions of Equity Rules 75, and 76, except the second paragraph of Equity Rule 76, promulgated by the United States Supreme Court, applicable to appeals, are hereby waived; and that the testimony and proceedings in court on the trial of this cause be included in the Transcript of Record on Appeal by producing therein a true

and correct copy of pages 1--1127 of the Reporter's Transcript herein, as the properly prepared statement of the said proceedings and evidence on behalf of both parties under the provisions of Equity Rule 75, which the parties request be approved as such by the Court.

SUBJECT TO THE APPROVAL OF THE COURT, IT IS FURTHER STIPULATED:

That such transcript on appeal shall further include a true and correct copy of the following papers, documents, orders, and proceedings entered and on file in the above-entitled cause:

(1) Bill of complaint, filed January 9, 1922;

(2) Notice of motion and motion for further particulars filed February 28, 1922;

(3) Answer of defendants, filed June 1, 1922;

(4) Substitution of attorneys filed September 15, 1922, and Notice of Substitution of Attorneys, filed September 15, 1922;

(5) Notice of motion to file Supplemental Bill, filed May 23, 1923; (omitting attached copy of supplemental bill)

(6) Order leave to file Supplemental Bill of Complaint entered May 28, 1923;

(7) Supplemental Bill, filed May 29, 1923;

(8) Bill of particulars, filed May 29, 1923;

(9) Stipulation use of uncertified copies, filed May 29, 1923;

(10) Notice of Motion that Defendants answer Supplemental Bill, filed June 6, 1923;

(11) Order entered June 11, 1923, requiring defendants to answer Supplemental Bill of Complaint;

(12) Answer of Defendants to Supplemental Bill of Complaint, Filed June 11, 1923;

(13) Notice to Produce, filed April 17, 1924;

(14) Notice of Motion to file second amended bill of complaint, filed April 17, 1924;

(15) Order denying motion to file second supplemental bill of complaint, entered April 21, 1924;

(16) Affidavit of E. R. Pratt in support of application for leave to take depositions, filed May 13, 1924;

(17) Transcript of proceedings and testimony on the trial of this cause, (pages 1 to 1127), excluding final arguments, filed May 28, 1924;

(18) Opinion of Court filed December 20, 1924;

(19) Order for Decree in favor of defendants in accordance with written opinion filed December 20, 1924;

(20) Final Decree of Dismissal, filed and entered January 2, 1925;

(21) Petition for appeal, filed January 14, 1925;

(22) Assignment of Errors, filed January 14, 1925;

(23) Order allowing appeal, filed and entered January 14, 1924;

(24) Bond for Appeal and Supersedeas Bond, filed January 16, 1925;

(25) Citation with acknowledgment of service, filed January 16, 1925;

(26) This stipulation;

(27) A Certificate under seal stating the cost of the record and by whom paid;

(28) The names and *addesses* of the parties to this appeal, and their attorneys, WESTALL AND WALLACE (Joseph F. Westall and Ernest L. Wallace), 611 California Bank Building, Los Angeles, California, solicitors and of counsel for Plaintiffs-Appellants, David G. Lorraine and The Lorraine Corporation, both of Los Angeles, California, and Frederick S. Lyon, Leonard S. Lyon, Number 708 National City Bank Building, and Frank L. A. Graham, and Ford W. Harris, Higgins Building, Los Angeles, California, solicitors and of counsel for defendant-appellees, Francis M. Townsend, Milon J. Trumble, and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Company, Los Angeles, California.

All of the above shall constitute, together with the book of Exhibits hereinafter mentioned, the transcript of record of said cause on appeal, upon which record said appeal shall be heard and determined (except in so far as the immediately foregoing language may be qualified by the second paragraph of Equity Rule 76), which transcript shall be printed in accordance with the Act of February 13, 1911, and the rules of this court.

IT IS FURTHER STIPULATED AND AGREED SUBJECT TO THE APPROVAL OF THE COURT:

That there shall be printed at the expense of plaintiff-appellants and in accordance with the provisions of the Act of February 13, 1911, and the rules of this court, a book of Exhibits which shall form part of the printed transcript of record on appeal for use in the said United States Circuit Court of Appeals for the Ninth Circuit on said Appeal which shall include copies of the following papers for documentary exhibits:

PLAINTIFFS' EXHIBIT 2, Certified Copy of Articles of Incorporation of Lorraine Corporation;

" " 11, Certificate of Secretary State of Nevada Re Articles of Incorporation;

" " 3, Original Assignment of David G. Lorraine to Lorraine Corporation;

PLAINTIFFS' EXHIBIT 8, Blue Print—Trumble Gas Trap, Type 1

" " 9, Blue Print—Trumble Gas Trap, Type 2

" " 10, Blue Print—Trumble Gas Trap, Type 3

" " 6, Cover of Mining & Oil Bulletin, January 1922;

" " 7, Cover of Mining & Oil Bulletin, March, 1923;

" " 22, 5 Advertisements of Trumble Gas Traps from Mining & Oil Bulletin;

" " 24, Advertisements from Mining and Oil Bulletin April 1921;

" " 12, Letter—January 4, 1922 to Trumble Gas Trap Co., etc., signed Chas. Bagg;

" " 13, Copy Letter unsigned to Trumble Gas Trap Co., dated Nov. 19, 1921;

" " 27, Envelope—The Lorraine Corporation;

" " 28, Invoice—The Lorraine Corporation;

" " 29, Letter Head—The Lorraine Corporation;

" " 26, Drawing of Trumble Gas Trap made by Witness O'Connor formerly marked #26 for Identification:

" " 16, Certified copy of Patent #1,-269,134;

" " 30, Blue Print, dated Nov. 1, 1919, corrected Dec. 1, 1919, No. 1, Gas Trap, Trumble Gas Trap Company;

" " 31, Blue Print—Gas Trap #2, Type B-1, Trumble Gas Trap Company;

" " 32, Drawing in Ink;
" " 33, Sketch Gas Trap made by witness Lacy;
" " 32-A, Strip paper with certain signanatures thereon;
" " 34, Blue Print, Lorraine Gas Separator, Drawing #192-1;
" " 35, Order D. G. Lorraine, dated Oct. 20, 1919, #21149—Llewellyn Iron Works;
" " 36, Photograph—Trumble Trap #186—Union Oil Company;
" " 37, Photograph—Trumble Trap #185—Union Oil Company;
" " 38, Photograph showing auxiliary Gas Separator on gas Discharge Line;

PLAINTIFFS' EXHIBIT 39, Photograph, Trumble Trap #180, Union Oil Co.;
" " 40, Photograph, Trumble Trap #169 Union Oil Co.;
" " 41, Photograph, Trumble Trap #210, Union Oil Co.;
" " 42, Photograph, Trumble Trap #212
" " 43, Photograph, Trumble Trap #606 & 680
" " 44, Photograph, Trumble Trap #194
" " 45, Photograph, Trumble Trap on Monterrey Well #3, etc.;

" " 46, Photograph, Trumble Trap #308

" " 47, Photograph, Trumble Trap #551

" " 23, Patent application receipt, 7/21/19;

" " 4, Drawings of Lorraine Trap;

Defendants' Exhibit F, Blue Print of Trumble Gas Trap Marked 42" Std. Gas Trap—Ty-115, 7/1/15;

" " N, Blue Print dated 10/1/15 of Trumble Gas Trap;

" " O, Blue Print dated 12/28/14, Type TV-102 Trumble Gas Trap;

" " P, Blue Print #1, Trumble Gas Trap, dated 6/12/16; T. W. 120

" " Q, Blue Print No. 3, Trumble Gas Trap, TW-121, dated 9/27/16;

" " YY, Blue Print—36" STD Gas Trap, dated 2/13/19, #1 Trap—T. G. T. Co.;

" " G, Order #74 of 5/26/21 of Trumble Gas Trap Co., to Western Pipe and Steel Co., 6—#2 Traps;

" " I, Order #56 to Western Pipe & Steel Company, dated 3/8/21—12 No. 1 Trumble Gas Traps as per Print #1;

" " Ex H, Order #65 to Western Pipe & Steel Company, dated 4/26/21, 6—#2 Trumble Gas Traps;

" " J, Order #66, to Western Pipe & Steel Co., dated 4/26/21, 3—#3 Gas Traps, etc.;

" " K, Order #70 to Western Pipe & Steel Co., dated 5/16/21, 5—#3 Trumble Gas Traps, etc.;

DEFENDANTS' EXHIBIT L, Order #73 to Western Pipe & Steel Co., dated 5/26/21, 6—#3 Trumble Gas Traps, etc.;

" " S, Order #71—Western Pipe & Steel Co., dated 5/17/21, 2—#3 Trumble Gas Traps,; etc.

" " JJ, Reissued patent #15580 to M. J. Trumble;

" " Ex OO, Tabulation of Gas Traps sold 1914 to 1921, Incl.;

" " Ex NN, Photo—Gas Traps in car —Side view;

" " Ex MM, Photo—Gas Traps in car —End view;

" " Ex M, Gas Traps Blue Print #3 —Dated 5/28/21 T. G. T. Co.;

" " Ex QQ, Trumble Gas Trap #169-4 Photos on Sheet;

" " Ex RR, Trumble Gas Trap #598-2 Photos on Sheet;

" " Ex SS, Trumble Gas Trap #180-4 Photos on Sheet;

" " Ex TT, Trumble Gas Trap #186-3 Photos on Sheet;

" " Ex UU, Trumble Gas Trap #185-4 Photos on Sheet;

" " KK, Copy Letters Patent #1,-432,221, Milon J. Trumble;

" " EE, Page 570—Mining & Oil Bulletin—October, 1922;

" " V, Blue Print of Lacy Mfg. Co., dated 10/4/22, Lorraine Gas & Oil Separator;

" " DD, Pamphlet—Trumble Oil & Gas Separator;

" " CC, 2 Photos-Trap #126, TGT Co. Eldora Oil Company;

" " VV, 1 Photo—Trap #144, St. Helens Pet. Co.;

"	" WW, 2	Photo—Trap #120, St. Helens Pet. Co.;
"	" BB, 2	Photos—Trumble Trap #148, Union Oil Company;
"	" AA, 2	Photos—Trumble Trap #125, Midway Northern Oil Company;
"	" A-3, 2	Photos Trumble Trap #134, Midway Petroleum Company;
"	" A-4, 2	Photos Trumble Trap #181, Trojan Oil Company;
DEFENDANTS'	EXHIBIT A-5, 2	Photos Trumble Trap #112, Honolulu Cons. Oil Co.;
"	" A-6, 2	Photos Trumble Trap #113, Honolulu Cons. Oil Co.;
"	" A-7, 1	Photo Trumble Trap #115, Honolulu Cons. Oil Co.;
"	" A-8,	Certified Copy File Wrapper & Contents Letters Patent No. 1,373,664, Lorraine;
"	" B,	Certified copy file wrapper and contents Reissue Letters Patent 15,220—Lorraine;

" " D, Copy Letters Patent #1,-127,722, R. E. Beckley;

" " E, Copy Letters Patent 249,487, E. P. Shetter;

" " W, Copy Letters Patent 1,-014,943, E. V. Bray;

" " X, Copy Letters Patent 776,753, A. T. Newman;

" " Y, Copy Letters Patent 856,088, A. T. Newman;

" " A-9, Copy Letters Patent 815,407, A. S. Cooper;

" A-10, Copy Letters Patent 1,055,-549, G. L. McIntosh;

" " C, Copy Letters Patent 454,106, J. N. Barker.

That within ten days of the time of hearing in the United States Circuit Court of Appeals all physical Exhibits offered in evidence by both parties hereto shall be withdrawn by attorneys for plaintiffs and forwarded

to the Clerk of said Circuit Court of Appeals for use on argument.

DATED February 6th, 1925.

WESTALL AND WALLACE,
By Joseph F. Westall
Solicitors and of counsel for Plaintiffs.
Frederick S. Lyon
Leonard S. Lyon
Frank L. A. Graham
Solicitors and of counsel for Defendants.

IT IS SO ORDERED THIS
7 DAY OF FEBRUARY,
1925.

Wm P James
U. S. District Judge.

[Endorsed]: No. F-80-J In the District Court of the United States in and for the Southern District of California Southern Division DAVID G. LORRAINE et al Complainant vs FRANCIS M TOWNSEND et al Defendants STIPULATION RE TRANSCRIPT OF RECORD ON APPEAL AND EXHIBITS FILED FEB 7 1925 CHAS N WILLIAMS, Clerk By L J Cordes Deputy Clerk

Westall and Wallace Patent Attorneys Suite 611 California Bank Building 629 South Spring Street, Los Angeles, Cal. Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

DAVID G. LORRAINE and THE LORRAINE CORPORATION, a corporation, Plaintiffs, vs. FRANCIS M. TOWNSEND, MILON J. TRUMBLE and ALFRED J. GUTZLER, partners, doing business under the firm name and style of TRUMBLE GAS TRAP COMPANY, Defendants.	CLERK'S CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 1142 pages, numbered from 1 to 1142 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellants, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, with acknowledgment of service, bill of complaint, notice of motion, motion for further particulars, answer, substitution of attorneys, notice of substitution of attorneys, notice of motion to file supplemental bill of complaint, order granting leave to file supplemental bill, supplemental bill of complaint, bill of particulars, stipulation, notice of motion that defendants answer supplemental bill, order requiring answer, answer to

supplemental bill, notice to produce, notice of motion to file second supplemental bill of complaint, order deneying motion to file second supplemental complaint, affidavit of E. R. Pratt, order for decree in favor of defendants, final decree, transcript of proceedings and testimony of the trial excluding final arguments, opinion, petition for appeal, assignment of errors, order allowing appeal, bond for appeal and supersedeas bond, and stipulation.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to
and that said amount has been paid me by the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-five, and of our Independence the One Hundred and Forty-ninth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By

Deputy.

No. 4582.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

David G. Lorraine, and The Lorraine Corporation, a corporation,

Appellant.

vs.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Company,

Appellees.

APPELLANT'S OPENING BRIEF.

WESTALL AND WALLACE,
By JOSEPH F. WESTALL,
Solicitors and of Counsel for Appellant-Plaintiff.

FILED
SEP 17 1925
F. D. MONCKTON,
CLERK

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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IN THE

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David G. Lorraine, and The Lorraine Corporation, a corporation,
Appellant.

vs.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Company,
Appellees.

APPELLANT'S OPENING BRIEF.

Copies of Exhibits.

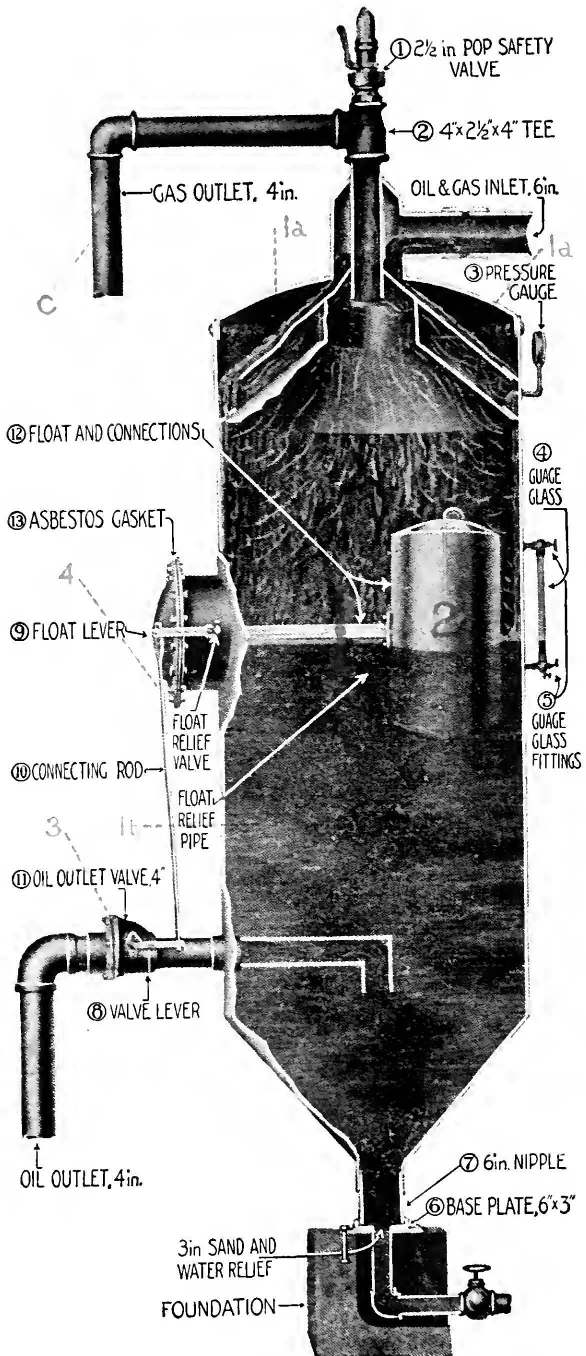
There should be before the court when reading this brief besides the transcript of record in two volumes and Book of Exhibits, a volume of Bound Copies of Patents. Numerous unwieldy paper exhibits such as rolled blue prints, magazine covers, advertisements and drawings were in evidence; and in preparing the record it was believed that reproduction in a book of exhibits, even (in the case of many of the blue prints) on a

greatly reduced scale would be preferable to endeavoring to handle the originals. Through inadvertence, however, reproduction of other documents such as patent specifications and drawings were unnecessarily reduced to a scale too small to be easily read. To remedy this, at the suggestion of opposing counsel, we present with this brief a volume of specifications and drawings of patent exhibits.

Statement of the Case.

Infringement is charged of claims 17, 18 and 19 of re-issued Letters Patent No. 15,220 (Book of Exhibits, p. 124; Bound Copies of Patents, p. 1) granted November 8, 1921, to David G. Lorraine for Oil, Gas, and Sand Separator,—which claims have been found by the Trial Court in its opinion (T. R. 1116) valid but not infringed. We do not believe that such finding of validity will be seriously questioned on this appeal—although there were numerous defenses attacking validity suggested on the trial.

It frequently happens that patent claims are impossible of understanding without recourse to accompanying descriptions and drawings, but this is not true in the present instance: the language of the claims is so clear and its application to defendants' device so obvious that additional description would seem superfluous. Dispensing with explanation, therefore, we copy on the following page defendants' illustration (taken from one of defendants' advertisements) of the form of separator here charged to infringe, and on the next succeeding page for easy comparison the claims in suit in analytical form, reference numbers in red on the illustration indicating corresponding numbered elements in the claims. From this it will be apparent at a glance that each and every element of the claims is found in defendants' separator:



① 2½ in POP SAFETY VALVE
② 4"x2½"x4" TEE
GAS OUTLET, 4in.
OIL & GAS INLET, 6in.
1a
1a
C
③ PRESSURE GAUGE
⑫ FLOAT AND CONNECTIONS
④ GUAGE GLASS
⑬ ASBESTOS GASKET
4
⑨ FLOAT LEVER
2
FLOAT RELIEF VALVE
⑤ GUAGE GLASS FITTINGS
⑩ CONNECTING ROD
FLOAT RELIEF PIPE
3
⑪ OIL OUTLET VALVE 4"
⑧ VALVE LEVER
OIL OUTLET, 4in.
⑦ 6in. NIPPLE
⑥ BASE PLATE, 6"x3"
3in SAND AND WATER RELIEF
FOUNDATION

CLAIM 17.

An oil and gas separator for oil wells including
(1) a receptacle having a
(a) a receiving chamber therein for the reception of oil and its constituents, and
(b) a settling chamber communicating with said receiving chamber;
(2) a float mounted in the upper portion of said receptacle for regulating the discharge of the oil therefrom, whereby a substantially uniform volume and level of oil may be maintained in said settling chamber at a point above the vertical center of the receptacle.

CLAIM 18.

An oil and gas separator for oil wells, including
(1) a receptacle having a
(a) receiving chamber therein for the re-reception of oil and its constituents, and
(b) a settling chamber communicating with said receiving chamber, said receiving chamber and said settling chamber having
(c) a common outlet whereby the gas liberated from the oil in both chambers may be commonly discharged;
(2) a float mounted in the upper portion of said receptacle for regulating the discharge of the oil therefrom, whereby a substantially uniform volume and level of oil may be maintained in said settling chamber at a point above the vertical center of said receptacle.

CLAIM 19.

An oil and gas separator for oil wells, including
(1) a receptacle having
(a) a receiving chamber and
(b) a settling chamber in communication;
(2) a float in the upper portion of said receptacle, pivotally supported on the walls thereof;
(3) an oil discharge valve communicating with said settling chamber and externally mounted on said receptacle;
(4) and means for operatively connecting said float with said valve.

Defendant-Appellees, Townsend, et al., are the holders of Letters Patent No. 1,269,134 (Book of Exhibits, p. 31; Bound copies of Patents, p. 9), granted June 11, 1918, to Milon J. Trumble for Crude Petroleum and Natural Gas Separator, which patent was by Your Honors in the appeal of Lorraine v. Townsend, et al., C. C. A., No. 3945 reported 290 Federal Reporter 54, held valid and found to be infringed by one of several forms of separators theretofore made by the present Plaintiff-Appellant, Lorraine. One of the principal contentions in the last mentioned appeal was that Lorraine also infringed the Trumble patent by making and selling the separator of the present re-issued Letters Patent No. 15,220 in suit; but this court held (290 Federal Reporter, two-thirds down page 59) that properly construed the Trumble claims "did not reach the structure exhibited in the drawings of Appellant's [Lorraine's] patent [Re-issue No. 15,220]."

Lorraine was and is at present in the business on a large scale of making and selling separators made in substantial accordance with the re-issued Letters Patent here in suit, which devices have been highly successful commercially; *and the present suit would never have been instituted if Defendant-Appellees had confined themselves to the manufacture and sale of the device illustrated and described in their Trumbull patent.* Instead, however, they have assiduously copied the combination of the re-issued claims in suit, necessarily altering the construction of the Trumble separator to incorporate the Lorraine invention.

It may be of passing interest to note that this cause was first tried before Judge Trippet (T. R. 62, 72)

and at the conclusion of the trial the court rendered a tentative opinion. Thereafter, the testimony having been transcribed, both sides filed exhaustive briefs. On behalf of Plaintiff and before the trial which resulted in the decision here appealed from, it was repeatedly offered (T. R. 62, 72) to submit the cause on such record, briefs and tentative opinion to Judge Trippet's successor; but counsel for defendants declined this saving of time and expense and insisted upon a new trial, and Judge James, from whose decision this appeal is being prosecuted, being thus denied the aid of Judge Trippet's experience and consideration of the matters involved, decided the case on a new oral argument.

In its opinion near the bottom of T. R. 1114, the Trial Court has found that the addition or incorporation of a certain one of the elements of our claims, namely, the receiving chamber, "marks but a small advance over devices well known and in prior use."

It is dangerous to lightly assume that any advance, however small, is inconsequential when it is claimed as an important feature of a concededly commercially successful device and a competitor appropriates it. Preliminary to our argument we may suggest that if the advance is in fact of little value then it will do no harm to a defendant to be compelled to cease using it, and if the court happens to be mistaken as to its importance, and it is, as we contend, really largely the foundation of the commercially successful separator, with stronger reason it should be protected; for that is why we secured a patent. It is no more right to steal ten cents than to steal a thousand dollars.

On the last page of the Trial Court's opinion (T. R. 1116) validity of the patent in suit is conceded—only within narrow limits it is true (notwithstanding our most earnest contentions to the contrary), *but may we not be protected within those narrow limits at least?*

Most briefly, the court will find the situation to be this: *Defendants make and sell a device which is exactly described by the language of each of the claims in suit; every element of each of these claims literally as described therein is found in defendants' device and each of said corresponding elements performs the same function in the same way and leads to the same result as does the corresponding element and combination of the claims in suit.* There is no attempt in the Trial Court's opinion to meet or explain away this fact. The gist of the decision appears to be that inasmuch as the court finds (erroneously as we contend) the contribution of the patent suit "marks but a small advance" over the prior art, its claim (T. R. 1114 near the bottom of the page) should be dismissed as without merit. Such finding is glaringly inconsistent with the action of this court when, after having found the Trumble patent to be hair-splittingly narrow, Your Honors sustained it and found it infringed.

The Issues.

After the experience of two trials of this cause, including the preparation of most exhaustive briefs on the first trial, we have in the foregoing statement dwelt almost exclusively upon facts and circumstances

relating to the charge of infringement. We have done this to conserve the time and attention of the court with the idea that if the most emphasized defenses should be found weak and insufficient the value of those which have been neglected by scant attention of most able counsel for defendant-appellees will not be over-appraised, and the court will enter upon their study with no more faith than did counsel apparently conclude.

In the brief before the first Trial Court over one-half of defendant's argument was devoted to the matter of infringement; nearly one-fourth to the defense of alleged new matter in the reissue; about one-twelfth to the defense of non-invention, while the remaining one-sixth was about equally divided among six other defenses, some of which we do not believe will even be mentioned on this appeal.

We shall surely be considered fair, however, if we permit defendant-appellees' counsel to state the issues for us. In his opening statement before the trial court (R. 87) counsel said:

> "The first defense here is that the patent is void because the reissue is not for the same invention as the original; the second one is because of the intervening rights of the defendant who is manufacturing what is asserted to be claimed during the time that intervened between the grant of the original patent and the application for the reissue; the third is total anticipation by the traps in common use and made and sold by the Trumble Gas Trap Company prior to Lorraine's invention and more than two years prior to his application for

> patent in suit. I say prior to his invention because Your Honor remembers that if it is one day prior to his invention it does not have to be two years prior to his application for the original patent. And the fourth defense is that, properly construed, these claims are limited to a feature which is not present in the defendant's devices."

A glance through the voluminous record will be sufficient present support for our statement that the defense of alleged anticipation by prior use was the principal defense attempted to be established during the trial. It utterly failed, however, for the reason, among other things, that on rebuttal plaintiff produced as witnesses the very men who admittedly had charge of the alleged anticipating traps and who testified to facts conclusively showing the non-existence of said use.

Generally there is found in every patent cause a number of patent specifications and drawings said to illustrate the development of the art, which are either urged as anticipations or in support of a defense of non-invention over the art. While in the case at bar there are a number of patents in evidence, they have not been relied upon as anticipations; and the court will particularly notice from the foregoing quoted opening statement of the issues by Mr. Lyon that there is no defense of non-invention. On the contrary, the subject matter is therein repeatedly referred to by Mr. Lyon as an "invention" and as "Lorraine's invention." No doubt the making of this admission was largely influenced by the fact that Your Honors, after a most

thorough study of the art, had previously found the Trumble patent valid and infringed (290 Fed. 54), and counsel's own argument on such appeal would have been found grossly inconsistent with any suggestion that the commercially successful separator of the Lorraine patent in suit—the device to which defendants have paid the great tribute of imitation (even enduring the inconvenience and expense of this suit rather than forego its advantages)—does not with stronger reason represent an investment of inventive genius.

The fact that defendant-appellees build their hopes on the defense of non-infringement is, therefore, no more a sign that the defense is strong than the actions of an exhausted swimmer are indications that a straw would make a good life preserver.

ARGUMENT.

One of the Chief Dangers to Logical Thinking Is the Confusion Resulting From Endeavoring to Consider too Many Things at Once. We Have Had to Struggle With It Throughout This Litigation. The Discussion of Three or Four Defenses in a Single Paragraph Presents a Fertile Field for Unsupported Assertions and False Assumptions Awkward to Handle in Any Seriatim Reply—in Fact It Renders Efficient Aid to Every Known Fallacy. Accordingly Let Us Consider One Thing at a Time.

We refrain for the present from discussing the great commercial value of the combination of the claims in suit because invention is apparently admitted. Logically, the fact that a defendant appropriates an invention is sufficient evidence of its value: if it is desirable enough to be copied without license, it is valuable enough to be protected by the decree of this court.

With the trial court room littered with blue prints, drawings, and photographs, with the great bulk of the record taken up by evidence for or against the defense of prior use—we might reasonably have selected such defense for first consideration, but as a very few later paragraphs will suffice to show the defense must be practically abandoned.

The technical defenses attacking validity of the reissue will also be easily disposed of.

Accordingly, let us conserve time by directing attention solely to the last refuge of the unauthorized

borrower of plaintiff's ideas—and not permitting ourselves to be diverted and confused by the camouflage of any other defense, let us single out and apply every known test to this defense, which, while admitting that defendants have plainly copied, deny that they have infringed.

Defendant-Appellees Infringe Because Each and Every Element as Described in the Claims in Suit Is Present in What Is Admittedly Defendants' Device; That Is to Say, Because the Claims Accurately Read on or Describe Defendants' Separator; and Because Considering the Claimed Combination as an Entity or Considering Each Element Separately, Defendants' Device as a Whole and Such Claimed Elements Separately, Perform the Same Functions in Substantially the Same Way, and Lead to the Same Results.

It will instantly be seen that if the foregoing black letter statements is correct there is not much left to argue; for, as the court will remember, the elementary law, as stated, for instance, in Continental Paper Bag Company v. Eastern Paper Bag Company, 210 U. S. 405, is that—"the claims measure invention," and as set forth in Walker on Patents (5th Ed.), p. 423, Sec. 339":

> "A patent for a machine or manufacture is infringed by him who, without ownership or license, makes, uses, or sells any specimen of the thing covered by any claims of that patent * * *

> but whoever infringes any one claim of a patent infringes the patent, whether or not it contains other claims which it does not infringe."

Accordingly, let us check carefully; for if we are correct this issue is very briefly disposed of.

It is elementary that the specifications and drawings may be referred to for better understanding the meaning of words of a claim. "A claim is to be construed in the light of the description," says Walker on Patents (5th Ed.), page 238, Sec. 182, citing many cases. When, therefore, the claims call for the mounting of the float in the upper portion of the receptacle, reference to the drawings of the patent in suit (Fig 4) shows a vertical cylindrical float with its bottom extending from below the vertical center of the receptacle to a point above its vertical center. This, clearly, is within the range intended by the patentee when he indicates mounting in the upper portion of the receptacle; and it is exactly the location of the float of defendants' device as shown in their advertisement, *supra*.

The purpose of this mountings is plainly stated in the claims to be to provide a means whereby a substantial volume and level of oil may be maintained. In defendants' device we see the relatively high float level and we see the consequent high oil level. Now compare the float and oil level of Trumble patent 1,269,134, (Book of Exhibits, p. 31; Bound Copies of Patents, p. 9). Why did not defendants continue to make their separators as illustrated in their patent? Why did they copy?

In comparing the device of the drawings of the Lorraine patent with that of the advertisement of the defendants, *supra,* the court, undoubtedly, has found that element for element, and function for function, the two devices correspond, and that the only difference is that the receiving chamber of Lorraine is segmental (as shown most clearly, perhaps, in Figs. 4 and 5 of the drawings of the Lorraine patent in suit), while the receiving chamber of defendants' device is the space above the cone.

Now one of the principal functions of the Lorraine receiving chamber is that it protects the float from the agitation which would result if the oil were discharged directly into the settling chamber. It is obvious even to an unskilled mechanic that various forms of this receiving chamber might be devised once the purpose and function is understood. For instance, the partition need not be vertical; it might be at an angle. Combined with the provisions for the high oil level, it minimizes agitation and gives a longer period for sand to separate out, thus reducing wear on the valves caused by the cutting action of the not completely separated sand. As a matter of common sense, what difference does form and location make as long as these vital functions are accomplished. Remember always that we charge defendants with infringement because they use the combination of our claims as a *combination.* It is thus totally immaterial that Trumble shows a like receiving chamber when plainly it does not contain the remaining features constituting the combination of the claims in suit.

As we shall immediately show, the circumstance of the Trumble partition between the receiving and settling chambers, namely, the cone, or as it has been called, the baffle plate, also performs an added function, namely, that of spreading out the oil in a thin film (as found by this court, 290 Fed. 54), as well as the fact that the receiving chamber is of a different form and location from the receiving chamber of the patent in suit, is, under the law, immaterial. These circumstances, under well settled law, do not avert a charge of infringement. *On the contrary, the fact that many of the claims of the patent in suit are limited to the form and location of the receiving chamber, while those in suit are not, shows clearly that the Patent Office contemplated a scope of the claims in controversy unlimited by form and location of such receiving chamber.*

It Is Elementary Law That a Change in Form and Location of One of the Elements of a Combination Does Not Avoid a Charge of Infringement.

The vital function is indicated by the name of the element "receiving" chamber, because it receives the oil. Other functions are that the partition protects the float and allows a certain amount of quiesence to permit settling of the sand. If these functions are performed by the Trumble partition, then there is equivalency notwithstanding differences of appearance, form, or location. Indeed the courts have frequently and explicitly so held:

In Adam v. Folger, 120 Fed. 260, a decision by the Circuit Court of Appeals for the 7th Circuit, Judges Jenkins, Grosscup and Baker, Circuit Judges, decision written by Judge Baker, a judge of long experience in patent law, it was held (2nd paragraph of syllabus):

> "While a patent for a combination is not infringed if any one of the elements of the combination is omitted, a change in the form or the location or sequence of the elements will not avoid infringement where they are all employed to perform the same functions, unless form, location or sequence is essential to the result or to the novelty of the claim."

The case of Metallic Extraction Co. v. Brown, 104 Fed. 345, Circuit Court of Appeals for the 8th Circuit, is of extreme pertinence for the reason that it relates, like the case at bar, to the location of a chamber. It should be noted particularly that the location of the chamber in this Metallic Extraction Company case *was expressly described in the claim* as "at the side of the main roasting chamber," yet the court, in view of the functions of the chamber, held that its location, *disclosed in the drawing and as specified in the claim,* was not essential, but that it was infringed by a chamber placed above or beneath the roasting chamber. Near the bottom of page 353, the court said:

> "We are unable to find in Brown's specification, considered as an entirety, or in the state of the art at the time his application was filed, sufficient reasons to warrant us in holding that he intended to claim less than what now appears to have been his full invention, and that the language of his claim

> locating the supplemental chamber 'at the side of the main roasting chamber' was used deliberately for the purpose of limiting it. We can conceive of no reason for such a self-imposed limitation, since it is obvious that whether the supplemental chamber was placed at the side of the main roasting oven, or underneath, it would operate in the same manner and produce the same result. As we have before intimated, we think that the words stating the location of the supplemental chamber crept into the claim inadvertently, because of the style of furnace that happened to be chosen to illustrate or embody the invention. We are accordingly of opinion that the first claim of the Brown patent should be construed to cover a supplemental chamber placed beneath the main roasting chamber, as in the Ropp device, because a supplemental chamber so placed is a mere mechanical equivalent for one located at the side thereof."

Even, therefore, if our claims *had* specified the receiving chamber as "segmental," the court would not be precluded from making such an application of the doctrine of equivalents which would find a different form and location of chamber to be an infringement.

In Consolidated Safety Valve Company v. Crosby Steam Gauge & Valve Co., 113 U. S. 157, looking to the *purpose and function, effect, and general result* of the combination, the Supreme Court held that a change by a defendant in location and relative position of a chamber, being one of the elements of the claims, did not avoid infringement.

In the case of Hoyt v. Horne, 145 U. S. 302, the question of equivalency between a horizontal and a

vertical partition was before the court. This vertical partition in the device there under consideration was called a "mid-feather." The court said:

> "The mid-feather is made vertical instead of horizontal, so that the pulp after it leaves the dam circulates in a horizontal instead of a vertical plane; but as it returns to the beater-roll it passes back under the dam, spreading out to the entire width of the tub, and is taken up by the beater-roll precisely as in the Hoyt patent. It is insisted by the defendant in this connection that there is no infringement of the first claim of the Hoyt patent, since the pulp is not circulated 'in vertical planes,' nor is it delivered by the beater-roll 'into the upper section of the vat,' as specified in that claim. Literally it is not. A technical reading of the specification undoubtedly required that the mid-feather should run horizontally instead of vertically; but the object of this was that the pulp should be received and delivered by the beater-roll along its entire length, viz., across the entire width of the tub—and this is accomplished in the same way in both devices. In both engines the beater-roll revolves toward the top of the dam or back-fall, and a similar acceleration of speed is obtained. How the pulp shall circulate at the other end of the tub is a matter of small consequence so long as it shall circulate in vertical planes at the point where it comes in contact with the roll."

The Fact That the Receiving Chamber of Defendants' Device, or Its Partition, Performs an Additional Function Not Performed by the Vertical Partition of the Patent in Suit Does Not Avoid Infringement.

It has been suggested that the Trumble partition performs in addition another function, not wholly performed by the vertical partition of the patent in suit, namely, that of spreading out all the oil in a thin film to assist in separation. Does this alter the fact of equivalency? In the case last quoted from (Hoyt, *et al.* v. Horne, *supra*), continuing the quotation above set forth, the court said:

> "An additional function is claimed for the Horne device in the fact that the pulp falling as it descends the dam from a vertical to a horizontal plane in a kind of torsional current, is more thoroughly mixed than in the Hoyt device, where the pulp continues to flow in parallel lines from the time it is delivered by the beater-roll to the time it is received by it again. This may be true, and defendant's engine may be in this particular an improvement upon the other, but he has none the less succeeded in appropriating all that was of value in the Hoyt device."

Walker on Patents (5th Ed.), Sec. 352, discussing the same point, says:

> "If it [the equivalent] performs the same function, the fact that it also performs another function is immaterial to any question of infringement." (Citing many cases.)

To Construe the Claims in Suit as Though They Contained the Word "Segmental" Before the Words "Receiving Chamber," That Is to Say, to Limit the Claims to the Form and Location of the Receiving Chamber Would Disregard the Clear Intent of the Patent Contract—Would Obliterate Differences Between the Narrow Claims and Those in Suit.

The Omission of Any Limitation in the Claims Sued on as to Form and Location of the Receiving Chamber Can Only Indicate, in View of the Express Limitations of Other Claims Not in Suit, That the Parties to the Patent Contract Intended No Such Limitation to Be Made.

No doubt the court has well in mind the elementary law as decided (first paragraph of syllabus) in National Hollow Brake Beam Company v. Interchangeable Brake Beam Company, 106 Fed. 693: "A patent is a contract, and its construction is governed by the same canons of interpretation that control the construction of other grants and agreements." At page 701 of the case last cited, it was said: "When the intention of the parties is manifest, it should control, regardless of inapt expressions and technical rules."

Now, what was the intention of the Government in making this grant as to whether the patentee should be limited to a "segmental" receiving chamber? It is elementary, of course, that every part of an instrument should be looked to to determine its meaning. Hop-

kins on Patents, page 194, puts the law in the form of rule as follows:

> **"Rule XI. The whole instrument is to be construed together, for the purpose of ascertaining the meaning of the whole and of every part."**

(Citing Holly v. Vergennes Machine Co., 4 Fed. Rep. 74-77.)

Referring now, for instance, to claim 7 (not charged to be infringed), we find the vertical partition dividing the receptacle into "a receiving chamber and a relatively larger settling chamber," with their means of communication with each other specifically claimed. *This claim clearly limits to the form and location of the chamber.* It was here plainly the intention of the Patent Office to grant *a narrow and specific claim.* The same is true of a number of other claims. When, however, we come to the claims in suit, namely, 17, 18, and 19, we find them *unlimited as to form or position of the receiving chamber.* Why would the Patent Office grant broad claims unless such claims were intended to be construed according to their plain import? If the Patent Office had *not* intended to grant to Lorraine claims which would cover not merely a segmental chamber in combination with the other elements, but *any kind of a receiving chamber,* why were such limitations of the claims in suit omitted? *Clearly these broad claims were granted because the Patent Office recognized that when once the idea of using a separate receiving chamber in combination with a settling chamber was understood, any mechanic by a*

slight change of location or form could easily evade the narrow claims. The purpose—and the only sane purpose that can be imagined—underlying the grant of broad claims not limited to the form or location of the receiving chamber was to protect broadly what the Patent Office decided was the invention.

Again let the court examine claim 16, for instance. Under counsel's contention that the broad claims in suit should be limited by interpolating "vertical" and "segmental" those broad claims would be exactly co-extensive with claim 16. If the Patent Office had intended any such effect, why did not the Examiner disallow claims 17, 18, and 19?

Quoting Thomas J. in Thompson Houston Electric Company v. Nassau Elec. R. Co., 110 Fed. 647, Hopkins on Patents, page 198, says:

> "The effort should be, in the construction of the letters, to ascribe a purpose to each claim, and to avoid a construction that would deprive a claim of a distinct purpose."

Surely, the rule that in construing a patent claim no word should be disregarded is merely a rule of common sense; for why would the Patent Office require words to be inserted in a claim unless they were to be given effect? Conversely, if the Patent Office after inserting a limitation in one claim omits it in another, can it be for a moment doubted that the omission of the limitation in the broad claim was intended to have some effect?

In concluding this branch of the argument we remind the court that a patentee is required in Sec.

4888, R. S. U. S., to describe "not *all* the modes or forms in which his invention is capable of being expressed, but only what in his opinion is the 'best mode of applying the same.' " When, therefore, the patentee shows in his drawings a vertical segmental chamber, this is to be understood only as the patentee's idea of one mode of arranging the chamber. This clearly implies that there may be other forms and locations of the receiving chamber which are within the spirit of the invention. Patentee is clearly entitled to all equivalent forms, namely, to those forms which perform the same functions whether they also perform additional functions or not, and even though such additional functions are of the greatest value to the art and are patentable improvements.

There Can Be No Possible Doubt That the Place Above the Cone of Defendants' Separator Is Properly Referred to as a "Chamber" for It Is So Designated in Defendants Patent.

The fact that defendant Trumble in his patent 1,269,134 (Bound Copies of Patents, p. 9), refers to the separator as consisting of two chambers, i. e., an expansion chamber and a settling chamber, furnishes to our mind conclusive proof of the strict technical accuracy of the description of the Lorraine receiving chamber. Notice particularly claim 5 of the Trumble patent which calls for—

> "The combination of an oil and gas separator of an expansion chamber having a settling chamber communicating therewith, means for delivering oil and gas into the upper portion of the expansion chamber * * *."

The Reissue Is for the Same Invention as the Original Letters Patent. The Alleged "New Matter" Consists Merely of a Restatement of Uses and Functions and Explanations of Mode of Operation. There Are No Structural Differences Between the Device Shown and Described in the Original Application and That of the Reissue. Drawings of the Original, Copied Without Change in the Application for Reissue, Show Fully the Combination of the Claims in Suit.

It is not the law that new descriptive or explanatory matter may not be contained in a reissue application. A careful reading of Section 4916 R. S. U. S. will demonstrate this, even without reference to authorities interpreting the statute, which are even more clear. Briefly, the statute provides that a new patent may be issued with a "corrected specification." Manifestly, it would seem that if the specification is to be corrected it must be changed. The statute also provides that the "specifications and claims in every case shall be subject to revision and restriction in the same manner as the original applications are."

Specifically concerning new matter, the statute provides (Sec. 4916, R. S. U. S):

> "* * * no new matter shall be introduced into the specification nor in the case of a machine patent shall the model or drawings be amended, except each by the other."

(Remember there is no change whatever in the drawings of the reissue over those of the original patent.)

Walker on Patents (5th Ed.), Sec. 240, page 301, says:

> "The provision, first enacted in 1870, that 'no new matter shall be introduced into the specification' is merely another way of saying that a reissued patent shall be for the same invention as the original. (Powder Co. v. Powder Works, 98 U. S. 138, 1878.) That provision, therefore, neither enlarged nor restricted the reissuability of Letters Patent; and, accordingly, it is not new matter, within its meaning, to state a new use of the invention shown in the original (Broadnax v. Transit Co., 5 Bann. & Ard., 611, 1880), nor to explain, in a reissue, the operation of a device which in the original was only described (Putnam v. Yerington, 2 Ban. & Ard. 243; Potter v. Steward, 18 Blatch, 561, 1881), nor to vary the description of anything described in the original." (Citing O'Reilly v. Morse, 15 Howard 62, 1853.)

In American Automotoneer Co. v. Porter, 232 Fed. 456, Judge Denison, who was a patent lawyer prior to his elevation to the Federal Bench, in his decision said at page 460:

> "The further and last statutory condition is that the reissue must be for 'the same invention.' It is true that, for purposes of determining infringement, the identity of the patented invention is fixed by the claims; but to apply the same test to identity of invention as between original and reissue loses sight of the difference between the real invention and the originally patented invention, and unless there is such a difference, there is no occasion for reissue. To recognize that difference

and permit it to be corrected is the whole purpose of the reissue statute; and so it seems quite destructive of the statute to assume that the identity of the actual invention is permanently declared and fixed by the form which the original claims are inadvertently allowed to take. In the same way as with reference to mistake, the question of identity is submitted to the Patent Office, and for the same reason its conclusion is to be taken as *prima facie right*. The last sentence of Section 53 even permits the Patent Office, in certain cases, to go entirely outside the record to determine what the original invention was. It follows that only when it is clear that the reissue is not for the same invention are the courts justified in reaching that conclusion; and we take this to be the rule of the decisions hereinafter cited."

In Krauth v. Autographic Register Co., 285 Fed. 203, it was said:

"In the reissue of the Krauth patent seven new claims were added, and these were based upon the disclosures made in the reissue specification. As to these new claims the original patent was inoperative, and these claims, or at least some of them, the defendant alleges, were based upon the 'new matter' introduced into the specification. Defendant's Exhibit 36 is the reissue letters patent, and the defendant has bracketed with pen and ink therein the so-called new matter added to the specification. The provision that 'no new matter shall be introduced into the specification' is only another way of saying that the reissued patent shall be for 'the same invention' as the original. The same invention refers to whatever invention was described in the original letters patent and

appears therein to have been intended to be secured thereby.

It is not new matter within the meaning of this provision to state a new use of the invention shown in the original; to explain, in a reissue, the operation of a device which in the original was only described; to vary and enlarge the description of anything inadequately described in the original. Walker on Patents (4th Ed.) Sec. 240, and cases there cited. An examination of the so-called new matter, bracketed as above stated, will disclose that it is not new matter within the meaning of the statute. Section 4916, U. S. R. S. (Comp. St. Sec. 9461). The 'new matter' is the statement of a new use, an explanation of the operation of the device or the varying of the description in the original patent."

In Potter v. Stewart, 7 Fed. 215, at page 216, it was held:

"It is of no consequence that the reissue states that certain combinations are found in the machine which will act in a certain way and effect certain results, when the original did not state that such combinations were found there, or failed to state that said modes of operation and said results would follow provided the said combinations in fact existed in a machine made according to the drawings and description in the original patent, or provided the said modes of operation and the said results in fact followed in a machine so made. To supply such defects is the very object and office of a reissue."

In the case of Giant Powder Co. v. California Powder Works, 98 U. S. 126, also came before the Su-

preme Court, appealed from the California District Court, and the Court, referring to the inhibition of the statute that "no new matter shall be introduced into the specification," said:

> "This prohibition is general, relating to all patents; and by 'new matter' we suppose to be meant new substantive matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent."

The court went on to say further that:

> "The legislature was willing to concede to the patentee the right to amend his specification so as fully to describe and claim the very invention attempted to be secured by his original patent, and which was not fully secured thereby in consequence of inadvertence, accident, or mistake; but was not willing to give him the right to patch up his patent by the *addition of other inventions,* which, though they might be his, had not been applied for by him, or, if applied for, had been abandoned or waived. For such inventions he is required to make a new application, subject to such rights as the public and other inventors may have acquired in the mean time.
>
> This, we think, is what the present statute means, and what, indeed, was the law before its enactment under the previous act of 1836. If decisions can be found which present it in any different aspect, we cannot admit them to be correct expositions of the law." (Italics ours.)

Of course, applicant for a reissue has the right to new and broadened claims. A comparatively recent

decision by Your Honors in Woolwine Metal Products Co. v. Boyle, 279 Fed. 609, is highly pertinent on this as well as other issues involved in the case at bar. In the Woolwine case as in the present controversy, the drawings of the original and reissue applications were identical. Five new and additional claims not found in the original were added to the reissue application, and were allowed by the Patent Office. Judge Bledsoe found these claims valid, and Your Honors affirmed.

There is clearly no new invention attempted to be covered by the reissue claims in suit, because the combination of elements mentioned is plainly disclosed in the original drawings. The specification does not describe any new structure.

Of course the presumption is heavily in favor of the validity of the reissue.

As has been seen from the quotation of Walker on Patents, *supra*, the provision regarding new matter, i. e., new inventions, has been part of the law since 1870. To the officers of the Patent Office entrusted with the duty of passing upon the propriety of the grant of reissue letters patent the law on the subject is well known and thoroughly understood, being in fact quite elementary. This court should be very reluctant to overturn the work of the Patent Office except upon the clearest possible showing. We submit that this defense cannot be sustained.

There Is No Possible Basis for the Defense of Intervening Rights.

A mere recital of the facts will dispose of this defense almost without reference to the authorities or argument.

The original patent was applied for February 5, 1920, and was granted April 5, 1921. A little over a month afterwards (May 9, 1921—see Defendants' Exhibit B, file wrapper and contents of the Lorraine Reissue Application, Book of Exhibits, p. 81), the petition for reissue had been prepared and the oath signed before a notary (as appears from the file wrapper, Book of Exhibits, p. 84). Receipt of petition as of June 7, 1921, was acknowledged by the Patent Office June 10, 1921 (Book of Exhibits, p. 110), but applicant was not given this date as his official application date for the reason only that the usual drawing did not accompany the reissue application, applicant evidently having assumed that as there was no change in the drawings from the original no new drawings were required. The drawings were copied from the original and filed in the Patent Office July 18, 1921. (See application date noted at head of specification and drawings and Book of Exhibits, p. 112.)

The court will take judicial notice of the fact that it takes about a week to receive a patent from Washington. While the original patent was granted April 5, 1921, it could not have been received before April 11, 1921 (April 10, 1921, falls on a Sunday). *Thus, only twenty-eight days elapsed between the actual re-*

ceipt of the original patent and the execution of papers to apply for the reissue.

Lorraine testified (T. R. 130-132) that he went straight to his patent attorney about the matter the same day that he received the patent, and that he discovered the defect in his original patent as soon as it was issued and delivered to him. The reissue application was placed in the hands of his attorney immediately (T. R. 130). Delay was caused by the fact that it was thought desirable to have a complete search made of the state of the art before filing the reissue application, but even at that, only twenty-eight days elapsed between the receipt of the original patent and execution of papers for the reissue. The papers were actually on file in Washington June 7 (one month and twenty-six days after the receipt of the original patent by Lorraine).

Now defendants have heretofore contended that their alleged intervening rights commenced *March*, 1921 (before the grant of the original patent, April 5, 1921). Of course, it is manifest that there could be no intervening rights until the grant of the original patent, so that if we take the actual facts as appearing of record that Lorraine immediately placed the matter of applying for a reissue in the hands of his attorney, there was no *period of time whatever for rights to intervene;* if we take the date that Lorraine actually executed papers and made oath, we have less than a month after receipt of his patent (namely, from April 11, 1921, to May 9, 1921); if we take the date of the actual filing in the Patent Office, we have less than a month later (June 7, 1921).

The reissue was undoubtedly a broadened reissue, and there is no case on record where more promptness in taking steps to procure a reissue were exercised.

The simplest and clearest statement of the law relating to reissues that we have been able to find is that written by Eugene D. Sewell, Examiner of the United States Patent Office, in a patent text book written by him. Mr. Sewell says:

> "The phrase 'intervening rights' is frequently used as if any one who, after the grant of a patent, made, used, or sold an invention disclosed therein but not protected by the claims thereof, invested capital for manufacturing it, or obtained a patent covering it, acquired thereby a vested right in that invention, so disclosed but not protected, which would bar the patentee from obtaining a reissue so amended as to cover it. Where there is a clear right to reissue, exercise promptly —as within two years from the date of the patent—there is no such vested right, unless the patentee by his word or deed has given reason for the belief that he intended to relinquish all that he did not claim. As the reissue law provides for the amendment of a patent, the presumption raised by the failure to claim is rebutted by the filing of a reissue application, and any one who invests capital on the presumption of the relinquishment of the matter not covered by the original patent does so at his peril. * * *
>
> Where there is a clear right to reissue, the appropriator of the invention is in somewhat the same position as the finder of a stray horse who appropriates, uses, stables, and feeds him. The original owner who lost the horse has a right to

> him that is superior to that of the finder who expended money on his care. So the original patentee has a right to the invention sought in the reissue that is superior to the right of him who intervenes, notwithstanding that money may have been expended by the latter."

We place great emphasis upon the fact that defendants commence to manufacture the subject matter of our reissue claims before the grant of the original patent. This shows conclusively that they did not adopt the subject matter of the claims in suit *relying upon any apparent dedication to the public by reason of Lorraine's failure to claim.* At the time defendants alleged they adopted the construction, they did not even know that Lorraine had a patent application pending on the subject matter. Suppose that the original patent had contained the claims in suit. Certainly their prior use before the grant of the patent would not have been a defense.

The most conclusive answer, however, to any argument on behalf of defendants on this alleged defense of intervening rights is that the time was too short under the law to give rise to any such rights.

Walker on Patents (5th Ed.), page 295, Sec. 237 (after a full discussion of Miller v. Brass Co., 104 U. S. 354), says:

> "The general rule is that a delay for two years or more invalidates a broadened reissue, unless that delay is accounted for and excused by special circumstances." (Citing many cases.)

Woolwine Metal Products v. Boyle, 279 Fed. 609 (decided by Your Honors) is a complete answer to any argument on the subject of intervening rights in the case at bar. The following outline of dates will be all that is necessary to enable the court to apply the law to the instant case:

Boyle had been manufacturing canteens since 1899. On July 15, 1916, he applied for a patent on the canteen; on June 19, 1917, original patent was granted to Boyle. This original patent contained one claim. On July 18, 1917, defendant Woolwine Products Co., put on the market a similar canteen. On July 26, 1917, defendant assignor applied for a patent on defendant's canteen, and on October 15, 1918, defendant's patent was granted. On November 19, 1917, Boyle commenced suit in this court (Judge Bledsoe); on March 4, 1919, Judge Bledsoe entered a decree finding noninfringement of the Boyle original patent; on April 11, 1919 (a little over a month after the decree of Judge Bledsoe) Boyle applied for a reissue. This reissue added five new claims. (Now, here note that the original having been granted June 19, 1917, and the reissue not having been applied for until April 11, 1919, one year and nine months and four days intervened between the grant of the original patent and the application for the reissue, which was also one year and eight months after defendant, Woolwine Products Company, had commenced making the canteens afterwards found to infringe the five new claims of the reissue patent. On April 5, 1919, Boyle started suit on the reissue patent against the Woolwine Products Company and on September 16, 1921, the

District Court (Judge Bledsoe) entered a decree sustaining the validity of *all new claims of the reissue patent.* This decree was affirmed by this Circuit Court of Appeals in the decision referred to (279 Fed. 609).

If no rights intervened during the nearly two years after defendants started to manufacture and before the grant of the reissue in the Boyle case, how could the almost immediate application of Lorraine be held to have let in any intervening rights, especially when it is not pretended that defendants relied upon any apparent dedication of Lorraine to the public, but actually started manufacture before the grant of the original patent.

Remember there has been no proof whatever offered as to any amount of capital invested in the infringing business prior to the application for our reissue, and after the alleged adoption of the infringing device. Defendants were in the business of making separators —the old unsatisfactory kind. We may assume that they had some capital invested in the manufacture of separators which did not infringe. The amount necessary to change over the unsatisfactory seperator to the successful one of the patent in suit has not even been attempted to be established by evidence. No doubt it was negligible. At any rate there is no basis for any finding that considerable or in fact any capital was invested to place upon the market the subject matter of our claims in suit before the application for our reissue.

We submit that Your Honors' decision in the Woolwine case, *supra,* should be followed, and that appli-

cation of such decision makes necessary a finding that the defense in the case at bar cannot be sustained.

There is no anticipation by prior use or otherwise. The only alleged prior uses attempted to be proven were of separators said to have been made by defendants; yet it is conclusively shown of record that defendants were advertising their old form of trap minus the subject-matter of the claims in suit up to the time of the grant of the Lorraine patent—over a year after the filing of its application.

The Lorraine original patent was granted April 5, 1921. (The re-issue, as we have seen, was almost immediately thereafter applied for.) In April, 1921 defendants were advertising for sale the old unsatisfactory separator of the Trumble patent. (Plaintiff's Exhibit 24; Book of Exhibits, p. 40.) Thus for seven years after application for the Trumble patent (from 1914 to and including April 1921) defendants, as shown by their own advertisements, were struggling with the old low level Trumble trap. (Note particularly the low gauge glass shown in the advertisement of April, 1921.)

After the grant of the Lorraine original patent (April, 1921) a remarkable change is shown in the subsequent advertisements (Plaintiff's Exhibit 22; Book of Exhibits, p. 36, et seq.) The court will note the vertical float and the high oil level (which makes use of such float possible), also the gauge glass located above the vertical center.

The foregoing circumstances are also of vital importance on any possible question of invention. If the subject matter of the Lorraine claims in suit was so simple, why did it take seven years for defendants to discover it; and why did they wait until Lorraine showed them how to make the successful trap?

At T. R. 23, in defendants' answer six alleged prior public uses are pleaded. Two of these only, namely, the Honolulu Oil Company of Taft, and the Union Oil Company of Brea, were attempted to be proven. *In both these uses, the devices said to contain the Lorraine invention were separators of defendants; that is to say, they were Trumble traps.*

Circumstances often speak louder than the most positive direct evidence; and the fact that defendants were admittedly advertising for sale their old low level form of trap as late as April, 1921, over a year after application for the original Lorraine patent, to our mind conclusively shows that the invention was not contained in the alleged earlier uses of defendants' traps—otherwise they would have been advertising that successful form rather than advertising the unsuccessful form.

Moreover, defendants produced the weakest possible evidence that the subject of the Lorraine claims in suit was actually used, and this evidence is most positively denied on rebuttal *by men who had actual charge of the separators.*

Paul Paine (T. R. 799), a paid expert on behalf of defendant (T. R. 961), was the only witness relied upon to prove the alleged Taft prior uses. On rebuttal

plaintiff called C. C. Farrah (T. R. 950, *et seq.*) and Thomas I. Sharp (T. R. 857), both disinterested witnesses, who positively and directly contradicted defendants' paid expert as to such uses. It was admitted that Mr. E. R. Pratt was in charge of the alleged prior uses at Taft. He was available, but defendants did not call him. What he would have testified to is set forth in his affidavit (made in our application for a continuance to get his evidence) (T. R. 57). He also positively contradicted Mr. Paine. Irrespective of whether his affidavit is in evidence, and regardless of any error of the court in refusing to grant us the continuance to get his evidence, there is no doubt but that the failure to call him as a witness on behalf of defendants was an admission that defendants knew that he would not testify as they desired.

As to the alleged use by the Union Oil Company at Brea, Thomas F. Morgan (T. R. 533), who was paid for services in testifying and gathering data in support of this defense (T. R. 1104), was relied upon by defendants to establish such use. Mr. Morgan is positively contradicted by a man who was actually present and had charge of and operated the alleged prior uses in question, namely, Ira B. Funk (T. R. 969), employed by the Union Oil Company for research work. Mr. Funk is a disinterested witness; and was not paid for his expert services as a witness.

He says his company objected to their employees being employed and paid as expert witnesses (T. R. 1103). He is certainly far more credible than Mr. Morgan, being clearly unbiased.

If the establishment of the defense of prior use only required a preponderance of the evidence, the court could find this defense had absolutely failed because the great preponderance is on the side of non-existence of any such uses. When, however, it is remembered that the law is clearly that a prior use must be established by evidence *beyond a reasonable doubt* (See case decided by this court of Schumacher v. Buttonlath Mfg. Co., 292 Fed. 523, and authorities cited middle of page 531), it will be appreciated how utterly defendants have failed in their attempted proof. We do not expect any serious effort in this court to sustain either of these defenses of prior use.

We should not conclude this discussion, however, without reminding the court of the fact that a blue print or drawing does not constitute a prior use. Defendants were in business of manufacturing separators from 1914. The court may no doubt take judicial notice of the statement of present counsel for defendant-appellees in plaintiff-appellees' brief p. 7, in No. 3945 of this court, Lorraine v. Townsend, where present counsel said: "Trumble Gas Traps went into widespread and general use displacing other gas traps, and became, and are today, the standard gas trap in use in the oil fields of the United States and foreign countries. The evidence shows that at the time of trial of this case [March, 1922], five hundred and eighty-three Trumble traps had been sold for use * * *." If there had really been a prior use of the subject matter of the Lorraine invention in any of these nearly six hundred traps, *why could not defendant adequately prove a*

single one? These separators are not perishable things —they last for years. There must have been dozens of witnesses who had actually seen and operated them. Why did defendants rely solely upon a paid expert in preference to the men who actually used and operated the traps and upon a witness who was hired to gather data? Let the court consider this evidence in connection with the circumstances that defendants were advertising the old form of traps until after the grant of the Lorraine patent. That is, they were advertising them for sale in April, 1921, over a year after the Lorraine application. We submit a more conclusive failure to prove a prior use cannot be imagined.

The Patented Art in No Way Limits the Claims in Suit.

In the answer twenty patents are pleaded, *but not as anticipations.* To be properly pleaded as anticipations the subject-matter should be alleged to be "patented" in some prior patent or described in some printed publication (which may be letters patent) (leaving out of consideration for the moment anticipation by prior use). The pleading of defendant is merely that the claims in suit are "invalid" in view of the patents mentioned in the answer. [Tr. 21.] Those patents were not offered as anticipations, and were not relied upon, and in fact, during the entire final arguments of Mr. Lyon on both trials we believe that not a single one of them was even mentioned.

As stated by the court in Forsythe v. Garlock, *et al.*, 142, Fed. 461, 463 (Court of Appeals 1st Circuit):

> "The citation of so many patents by a respondent in an infringement suit sometimes tends, as we have several times said, not so much to weaken the complainant's position as to strengthen it, by showing that the trade had long and persistently been seeking in vain for what the complainant finally accomplished."

Conclusion.

There were a great many defenses discussed during the first trial which were not mentioned during the second.

We had difficulty in separating the defenses for intelligent consideration, so prone they were to change colors like a chameleon. For instance, the defense of prior use would suddenly change into something resembling a defense of prior invention or knowledge by someone not pleaded in the answer.| However, the many scattered arguments on these changes did not seem to be seriously pressed, but were more in the form of suggestions.

In view of the fact that the court found validity in its opinion, and apparently did not consider many of such numerous defenses of sufficient importance to mention or discuss, and there is no cross appeal, we believe we have made a fair opening in fully discussing the four defenses mentioned by counsel in his opening statement quoted *supra*, and we believe we have fully met and answered any suggestions or reasons in sup-

port of the failure to find infringement in the trial court's opinion.

In conclusion we urge that the claims in suit are in no way limited by the art, and their subject-matter has been clearly appropriated without license by defendants.

We respectfully submit that the decree appealed from should be reversed with costs and the trial court directed to enter a decree in favor of plaintiff finding the claims in suit valid and infringed, granting the injunctive relief prayed, and referring the cause to a Master to determine the damages and profits.

Respectfully submitted,

WESTALL AND WALLACE,

By JOSEPH F. WESTALL,

Solicitors and of Counsel for Appellant-Plaintiff.

No. 4582.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT. 3

David G. Lorraine, and The Lorraine Corporation, a corporation,
Appellant.

vs.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Company,
Appellees.

APPELLEES' OPENING BRIEF.

FILED
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No. 4582.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

David G. Lorraine, and The Lorraine Corporation, a corporation,

Appellant.

vs.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Company,

Appellees.

APPELLEES' OPENING BRIEF.

From a final decree dismissing plaintiffs' bill of complaint and supplemental bill of complaint, plaintiffs appeal.

Herein the parties will be referred to as they appeared in the District Court, to wit: appellants as "plaintiffs", and appellees as "defendants."

The suit is the usual one upon Letters Patent of the United States for an injunction to prohibit alleged infringement and for an accounting of profits and damages.

The patent in suit is a reissued patent, No. 15,220, granted November 8, 1921, in substitution for original Letters Patent of the United States No. 1,373,664, dated April 5, 1921. The patent refers to *Improvements* in Gas, Oil and Sand Separators.

The construction of the device illustrated in said original Letters Patent No. 1,373,664 has already been considered by this Court.

Defendants are owners of the Trumble patent 1,-269,134, granted July 11, 1918. Under this Trumble patent, defendants have long been engaged in the manufacture and sale of gas-traps, denominated in the Trumble patent "crude petroleum and natural gas separators." Defendants had established a prosperous business in the manufacture and sale of such Trumble gas-traps, which had become the standard gas trap for use at producing oil wells. Sale of such Trumble traps by defendants commenced in 1915.

The plaintiff David G. Lorraine conceived what he believed to be *an improvement in the valve mechanism* of such trap. He sought to interest the defendants in such alleged invention and to sell the invention to defendants. Failing to make a deal with defendants, plaintiff David G. Lorraine conceived the idea of going into the gas trap business, as he coveted the business enjoyed by defendants. In pursuance of such desire to divert to himself the good-will of defendants' established business, the plaintiff David G. Lorraine designed the specific construction of gas trap shown in said original patent 1,373,664, embodying therein the valve mechanism (which he had represented to de-

fendants he had invented) and commenced to manufacture and sell such traps. But he modified some of the details of construction from the trap depicted in the patent drawing. In particular, he extended the deflector cone or plate 17 so as to cause the baffle-plate or cone 17 to distribute "approximately the whole body of oil in an unbroken condition to the adjacent segment of the chamber wall, down which it flowed substantially as in the Trumble device" (290 Fed. bottom p. 59). No other construction of trap closely approximating the detail construction depicted in this Lorraine patent was ever manufactured or installed by either of the plaintiffs.

Thereupon defendants brought suit against plaintiff David G. Lorraine in the United States District Court for the Southern District of California for infringement of said Trumble patent 1,269,134, and particularly claims 1, 2, 3 and 4 thereof.

After this suit had been pending some time, and just before its trial before Judge Wolverton, plaintiff herein, David G. Lorraine, changed the construction of his gas traps. These defendants thereupon filed a supplemental bill of complaint at the trial, bringing thereinto as an alleged infringement such modified form and construction of Lorraine gas trap.

At the trial Judge Wolverton held that both the construction of gas trap shown and described in the Lorraine patent 1,373,664 and the modified Lorraine construction infringed the Trumble patent. An interlocutory decree awarding an injunction and an accounting of profits and damages was entered.

From this decree plaintiff herein, David G. Lorraine, appealed. This Court on June 4, 1923, rendered its opinion upon such appeal (290 Fed. 54). This Court held that in view of the prior art and prior patents, the Trumble invention was of relatively limited scope. This Court held the Trumble patent to be infringed by the Lorraine trap as shown in the Lorraine original patent 1,373,664, as exemplified in the first traps constructed and installed by Mr. Lorraine, (for example, on the Tonner well No. 3, referred to by Judge Wolverton in his opinion as "Model No. 1".) See particularly 290 Fed. at p. 59. This Court, however, reversed Judge Wolverton's decree in so far as it liberally construed the said Trumble patent and decreed the same infringed by the second or modified form and construction of the Lorraine gas trap, which latter departs essentially from that depicted in the Lorraine patent.

It is thus seen that this Court thus adjudicated said case by a finding that the business of the plaintiff David G. Lorraine had its incipiency in the piracy of defendants-appellees' patent rights. In effect, such adjudication necessarily included and implied that plaintiff Lorraine was a mere improver in details of construction.

The present suit was commenced on January 22, 1922, after the suit upon the Trumble patent had been set for trial, and just before the trial thereof which commenced on March 22, 1922. Obviously, the suit was filed for two purposes. One was for a hoped effect upon the Trumble trial, and the other

was to effect a counter-charge of infringement which could be circulated amongst defendants-appellees' trade.

It should be noted that although the original Lorraine patent issued April 5, 1921, and the original suit upon the Trumble patent had been filed on January 3, 1921, no counter-suit was brought upon the original Lorraine patent. Nor was any counter-suit brought on the Lorraine reissued patent until on the eve of the Trumble suit.

The proofs fully show that long prior to the application for the reissue of the Lorraine patent, defendants had been manufacturing gas traps identical in construction with those asserted in this suit to infringe the Lorraine patent as reissued, and that Mr. Lorraine had full knowledge of this prior to his application for a reissue of his original patent.

The proofs show that these defendants had their attention called to the original Lorraine patent shortly after its issue. The defendants caused said original patent to be examined, and defendants both themselves determined therefrom, and were advised by their patent counsel, that such original Lorraine patent was addressed to, covered only, and was limited to the specific details of construction shown and described in such patent and to the specific valve arrangement which plaintiff David G. Lorraine had asserted to these defendants he had invented, and in which defendants were not interested, and which they have never used, and which they are not even charged with ever having used. Defendants were advised that no gas trap manufactured by them embodied anything covered by said

original Lorraine patent. Relying upon the limited character of said original Lorraine patent, defendants proceeded with the further extension of their business and the manufacture and sale of such non-infringing traps.

There is no issue in this case upon this fact: Said original Lorraine patent 1,373,664 was limited to the specific form and construction therein shown and to the particular valve mechanism arrangement therein shown and described. This is an admitted fact.

It is obvious, therefore, that the reissued Lorraine patent in suit must be a broadened patent, or it could not be infringed. If the reissue had been for the purpose of narrowing the original patent, then, in as much as it is conceded none of defendants' gas traps infringed the original patent, none of them could be contended to infringe the reissued patent.

We shall point out in detail later that the Lorraine reissued patent is, in law, for a different invention than that for which the original was granted. By such statement we do not mean merely that the attempted scope of the reissued patent is more comprehensive or that the claims are in more general terms, but, on the contrary, that both the specification and statement of the invention and the technical claims are addressed to an alleged different invention from that for which the original patent was granted. By the term "different invention" herein, we refer to a different invention under that rule of law, well established by the Supreme Court, that reissued patents must be for the same invention as sought to be

patented in and by the original patent. The original patent was granted for a mere improvement in details of the specific construction and arrangement of the partitions of the gas trap whereby it was divided into chambers located and arranged in specific relations one to another (claims 1 and 2) and to a specific valve mechanism (claims 3, 4 and 5).

This suit is not based upon any of the claims of the original patent. The five claims of the original patent are repeated as claims 1 to 5, respectively, of the reissued patent. Fourteen additional claims, numbered 6 to 19, appear in the reissued patent. Infringement, however, is charged only of the last three claims of the reissued patent, to wit: claims 17, 18 and 19.

The Defendants' Gas Trap.

The gas trap manufactured and sold by defendants, and asserted to infringe claims 17, 18 and 19 of this Lorraine reissued patent, are substantially identical with the trap shown and described in the Trumble patent 1,269,134 and with the gas traps manufactured and sold by defendants for years prior to Mr. Lorraine's original application for the original patent 1,373,664. It is not asserted or claimed on behalf of the plaintiffs that defendants have adopted or used any element invented by Mr. Lorraine, nor any detail of construction invented by Mr. Lorraine, or that defendants have changed the construction of their Trumble trap in any mechanical feature.

Defendants have used various forms of valves. In some of defendants' traps the valve operating mechanism has been located within the chamber of the trap. In others, external of the body of the trap. Both types and constructions were used by defendants long prior to Mr. Lorraine's alleged invention and years prior to his application for patent. No claim, however, is made by plaintiffs that at any time have defendants used the valve mechanism which Mr. Lorraine claims to have invented.

All traps manufactured by the defendants have been manufactured in substantial accordance with the Trumble patent 1,269,134. In all the Trumble traps the incoming stream of oil and gas from the well is delivered onto a spreader cone 22 (Trumble patent) and by the spreader cone spread out on the walls of the trap, thus utilizing this principle of the Trumble invention. Defendants have never departed therefrom. The number of spreader cones embodied in defendants' trap has varied. This is true both prior and subsequent to Lorraine's alleged invention and prior and subsequent to the issue of the Lorraine patent. Some of defendants' traps have been provided with only one spreader cone, others with varying numbers.

No changes whatever have been made in the cooperative relations of the various elements of defendants' Trumble trap. All of defendants' Trumble traps have been provided with "an expansion chamber arranged to receive (from the well) oil and gas in its upper portion"; all have been provided with the spreader cone forming "means for spreading the oil

over the wall of such chamber to flow downwardly thereover"; all have been provided with "gas take-off means arranged to take off gas from within the flowing film of oil"; all have been provided with "an oil collecting chamber below the expansion chamber"; all have been provided with "an oil outlet from said collecting chamber"; and all of them have been provided with "valve controlled means arranged to maintain a submergence of the oil outlet",—as explained in the Trumble patent and set forth in claim 1 thereof. Valves of different constructions have been used. Such valves have been arranged both internally (within the trap as depicted in the drawing of the Trumble patent), and externally of the trap (as shown in various exhibits). Infringement, however, is not charged or asserted because of any particular valve mechanism.

What, then, is the asserted Lorraine invention which defendants are claimed to have infringed? Obviously, such Lorraine invention cannot be patentably novel and exist in anything depicted in the Trumble patent or in any of the Trumble traps manufactured and sold by defendants prior to the alleged date of the alleged Lorraine invention. It is obvious, therefore, that not only were there many gas traps prior to Trumble,—(as determined by this Court in Lorraine v. Townsend, 290 Fed. 54, including Cooper, to whom patent No. 816,409 was issued on March 20, 1906; MacIntosh, patented March 11, 1913, No. 1,055,549; and Bray, patented June 16, 1912, No. 1,014,943,)—but the art prior to the alleged Lorraine invention also comprehended the Trumble invention and all of the disclosures

of the Trumble patent. Nothing depicted in the Lorraine patent which is common to any of these prior gas traps or prior patents, can be the Lorraine invention.

Having thus subtracted from the gas trap of the Lorraine patent all that was thus old and well known in the gas trap art, what new thing invented by Lorraine is it that defendants have wrongfully used?

The Court will search in vain the Appellants' Brief for an answer to this question.

The failure of plaintiffs-appellants to succinctly point out what it was that they claim Mr. Lorraine invented —what they claim was really his novel conception or idea that has been "pirated" by these defendants—has not been due to inadvertence on their part. Such failure is inherent in their asserted cause of action. Notwithstanding that this case was originally tried in open court before the late Honorable Judge Oscar A. Trippet, (who died before the rendering of a decision), and has again been tried *de novo* in open court before the Honorable William P. James, no such succinct statement of claimed invention has ever been made on behalf of the plaintiffs. This was brought directly to the attention of plaintiffs at the trial in the District Court. (See, for example, Transcript, bottom of p. 74.) During the oral arguments his Honor Judge James in vain requested plaintiffs' counsel to state precisely what was asserted to be the Lorraine invention. Plaintiffs' counsel evaded an answer.

We invite the attention of the Court to the patent in suit in order to determine this question.

The Patent in Suit.

The Supreme Court says:

> "It is as important to the public that competition should not be repressed by worthless patents as that the patentee of a really valuable invention should be protected in his monopoly."
>
> (Pope Mfg. Co. v. Gormully, 144 U. S. 224, 234.)

In the patent in suit Mr. Lorraine has illustrated a gas trap in which he divides the interior of the receptacle

> "into two separate segmental chambers, by means of a vertical partition arranged therein and in communication at the top of the receptable with the gas collection chamber, and at the bottom thereof with the oil receiving portion of the receptacle. The oil with its constituent elements is delivered from the well into the upper portion of the receiving chamber on one side of the said partition, which is relatively smaller than the other chamber of the receptable, and the oil or emulsion rises to a higher level in the receiving chamber than the level of the volume of oil in the main chamber." (Reissue patent in suit, p. 1, lines 58-71.)

In the drawings, this separation into two chambers is accomplished by means of the verticle partition 19. The purpose and function of this construction is thus stressed in the Lorraine reissue patent:

> "The arrangement of the said partition prevents the disturbance of the main volume of oil and permits the settling of the sand and water to

the bottom of the tank, while the injection of the oil and its constituent elements from the well into the receiving chamber of the receptacle liberates a large volume of gas, as the oil enters the receptacle and thus the gas liberated collects in the upper portion of the receptacle. The heavier elements settle to the bottom of the tank and rise to and maintain a substantially uniform level in the main chamber thereof." (Reissue patent in suit, p. 1, lines 71-84.)

"The lower end of this partition 19 may terminate or have communication with the opposite chamber well above the bottom of the receptacle and the partition forms a confined vertical passageway or chamber down which the oil issuing from the mouth 18 of the inlet sleeve 15 is directed and is caused to pass beneath the lower edge of, or through the partition 20 before the lighter materials, such as gas and oils, can rise to a predetermined variable height in the receptacle. This enables the sand that may be contained in the oil or emulsion, coming from the supply pipe 12, to settle toward the bottom while the oil passes around the lower edge of or through parts in the partition and ascends in the larger compartment formed on the opposite side of the partition. The upper end of said partition may also terminate short of the top of the receptacle or have parts there in communication with the gas chamber." (Reissue patent in suit, p. 2, lines 94-115.)

In his description of the operation of the patented gas trap, Mr. Lorraine says:

"The oil mass, or emulsion in some cases, passes beneath the lower end of or through the

partition 19 and thus facilitates the deposit or separation of solids such as sand or other heavy substances, and the lighter portion of the oil with the gas and the emulsion rises into the larger compartment of the receptacle and passes upwardly to a level that is determined by the position of the pneumatic float 56." (p. 3, lines 106-115.)

* * * * * * * * * *

"Preferably water is maintained in the bottom of the receptacle to a level somewhat above the lower end of the sand sheet or partition or part therein, so that the incoming supply of oil when passing below the lower end of or through the partition is brought into contact with the water and the attrition between the emulsion causes a rapid separation of the gaseous content as the oil and mixture engages the water." (p. 4, lines 59-68.)

* * * * * * * * * *

"It will be further understood that because of the vertical partition within the separating receptacle and the provision of the separate receiving and separating compartments, the products of the well are delivered into the smaller receiving chamber and all of the agitation of the oil is effected in the receiving chamber, while the main volume of oil is maintained at a stationary level and without agitation in the larger settling chamber of the receptacle. Now, this in the case of oil and gas other than emulsion is effected without pressure. The tendency of oil and products is to create pressure when the same is agitated in the receptacle and by the provision of the partition receptacle described herein. This

> agitation and the consequent increase of pressure within the receptacle is entirely eliminated and the gas is allowed to flow freely from the gas collection chamber in the minor and upper portion of the receptacle." (p. 4, lines 106-127.)

This specific form of division of the gas trap cylinder into two vertical chambers arranged side by side and intercommunicating at the bottom, forms an essential difference in structure between the Trumble gas trap (as patented and as manufactured by defendants both prior to Lorraine's alleged invention and subsequent thereto) and the Lorraine gas trap. No Trumble gas trap has ever been built upon any such principle. On the contrary, all of defendants' gas traps have been constructed with cones or spreader plates 22 (Trumble patent) at the top of the cylindrical gas trap. Thereby the distinguishing mode of operation of the Trumble invention has been produced and accomplished. Thereby the incoming intermingled oil and gas or oil, sand and gas is distributed onto the surface of such cone and by it deflected to and directed onto the inner surface of the shell of the trap, down which it flows in a thin film or sheet. This is well brought out in both the Trumble patent and in the opinion of this Court in 290 Fed. p. 54.

Not only, therefore, is the mechanical structure different, but the mode of operation and principle is different.

If, then, this be the novel feature of the Lorraine reissued patent, there can be no infringement. Not only is the structure of defendants' traps solely that of

the art prior to the alleged Lorraine invention, but the changed mode of operation produced by the Lorraine structure has not been adopted or used in the defendants' trap.

> "Rule XI. Where the mode of operation of the alleged infringement is substantially different from that of the patent in suit, infringement does not exist."

(Hopkins on Patents, Sec. 279.)

> "If the device of the respondents shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement is avoided."

(Cimiotti Unhairing Co. v. American Co., 198 U. S. 399, at 414.)
Union Co. v. Battle Creek Co., 104 Fed. 337, 343;
Brooks v. Fiske, 15 How. 212, 221;
Jewell Filter Co. v. Jackson, 140 Fed. 340;
H. F. Brammer Mfg. Co. v. Witte Hdwe. Co., 159 Fed. 726, 728.

In Union Steam Pump Co. v. Battle Creek Co., 104 Fed. 337, 343, the Circuit Court of Appeals for the Sixth Circuit says:

> "If, however, such changes of size, form, or location effect a change in the principle or mode of operation such as breaks up the relation and co-operation of the parts, this results in such a change in the means as displaces the conception of the inventor, and takes the new structure outside of the patent."

If patentable novelty can be assigned to the specific arrangement of the vertical side by side chambers with their intercommunication at the bottom of a vertical partition below which is formed a settling chamber, (as thus stressed in the Lorraine patent), it necessarily follows that the invention exists in and is limited to the changed principle of operation incident to such specific form and location of these chambers. If patentable invention can be predicated upon this difference between this specific construction and the well known prior art construction as exemplified in either the Bray patent 1,014,943, of June 16, 1912, or the Trumble patent 1,269,134, of 1918, such patentable invention cannot be construed of such breadth of novelty as to include within it such prior construction. If, then, this is plaintiffs' case, it falls by its statement. No trap manufactured or sold by defendants embodies this construction or the principle of operation thus stressed in the Lorraine reissued patent. In considering the claims asserted to be infringed, we shall further refer to the fact that defendants' Trumble traps have all retained the principles of construction and the novel principle of operation of the Trumble patent; in so far as this vertical arrangement of chambers marks a change in principle or function or anything more than the merest selection and designer's skill, the essential fact remains that defendants have never availed themselves of it. On the contrary, defendants have always utilized the Trumble design.

This alleged improvement was patented in the original Lorraine patent 1,373,664. See particularly claims

1 and 2 thereof. These claims are repeated in the reissued patent. Infringement of them is not charged.

However, the Lorraine reissued patent says:

> "Still another object of my invention is to provide effectual means for automatically controlling the discharge of the oil and gas from the apparatus separately and especially to provide a float device adapted to withstand the pressure that may remain within the separating receptacle and whereby the discharge of the gas and oil is effectually controlled." (P. 1, lines 98-106.)

It is not contended by plaintiffs that defendants have infringed any improvement invented by Mr. Lorraine and referred to in this statement.

The quoted paragraph refers to two separate and distinct details of alleged improvement: (1) "means for automatically controlling the discharge of the oil and gas from the apparatus separately", and (2) "especially to provide a float device adapted to withstand the pressure that may remain within the separating receptacle". (This detail of alleged improvement is in no manner or degree involved in this suit.)

The first of these refers to the specific valve arrangement. This arrangement is such that actuation of the oil outlet valve and actuation of the gas outlet valve is coincident or synchronous. The one float controlled by the rise and fall of the liquid in the trap coincidentally actuates both the oil outlet and the gas outlet valves. This alleged improvement is the subject-matter of claims 3, 4 and 5 of the original Lor-

raine patent 1,373,664 and of the similarly numbered claims of the Lorraine reissued patent in suit. None of these claims are charged to be infringed. Nor is there any charge of infringement of claims 6 to 16, inclusive, of the Lorraine reissued patent, which claims are specifically limited to this automatic and coincident control and operation of the oil and gas valves by the same float. This is a feature of construction which has never been utilized by the defendants. The evidence shows that this valve arrangement was the feature which recommended itself to the users of gas traps and enabled Mr. Lorraine originally to secure a part of the gas trap business. The testimony of the witnesses fully demonstrates this. Examples will be found in the testimony of F. M. Townsend (R. 586-591); M. J. Trumble (R. 725-726); Paul Paine (R. 811).

As said in the opinion of the District Court:

> "Bray, as described in Patent No. 1,014,943, dated January 16, 1912, had designed a gas trap which consisted of a large metallic container, the equivalent, so far as the general idea of a container is concerned, to that found in both the plaintiffs' and the Trumble patents. Bray distributed the incoming oil over perforated conical plates installed in the upper part of his container, there being three in number, one underneath the other. He seems to have considered that it was desirable to break up the oil as an aid to the separation of the gas and for that purpose perforated his conical sections, so as to permit the dripping of the fluid. The Bray patent was cited

in a suit between the same parties as here appear, wherein it was contended by these defendants that their patent had been infringed in certain of its claims by the device manufactured under Lorraine's reissue.

"See Lorraine (appellant) v. Townsend, *et al.*, 290 Fed. 54.

"A reading of that decision, with the citations made in it, shows that the court considered the inventive field a narrow one. Lorraine included in his device two features different from those which had preceded him in that he fed his oil and gas mixture into a chamber built within the main container, walling this chamber off and attaching it to one side of the enclosing cylinder. The inner chamber opened into the main inner receptacle at the top, the lower end of its inner wall being designed to be kept submerged in the oil contained in the main receptacle. He applied, too, a synchronized valve connection attachment of his own invention, the valve being placed outside the receptacle. As the float within the chamber rose or fell with the liquid surface of the oil contained therein, the oil outlet would open or close and the gas outlet would operate in the reverse. A feature of the device of both parties was to increase the gas pressure in the upper part of the chamber as the liquid contents ascended, one function of this pressure being to expel the oil more rapidly. That feature was not new. It was used by Bray before it had been used by either of these parties, as well as Cooper in 1916. The synchronized valve as a separate thing, it seems to be conceded, is entitled to a claim for

originality, but it is not made use of in the Trumble apparatus." (R. pp. 1112-1114.)

* * * * * * * * * *

"I have not considered it necessary to enter into a discussion of the functions of the segmented chamber of Lorraine, as compared with the baffle plates of Trumble. The feature of pressure maintained within the chamber is common to both, and not a matter involving a new idea. This is plainly pointed out in Lorraine v. Townsend, *supra.* Within the narrow limits left by a very much occupied field, I think that the segmented chamber and its arrangement in connection with the gas separation device is the only thing, aside from the synchronized valve, that may be said to entitle the Lorraine patent to a claim of validity.

"I find that the charge of infringement is not sustained.

"The decree will therefore be for the defendants and will include costs in their favor." (R. 1116.)

(Plaintiffs assert that these "claims have been found by the Trial Court in its opinion [Tr. 1116] valid but not infringed." Upon what finding of the District Court such assertion is based cannot be understood. The District Court's opinion just quoted does not pass upon the validity of these claims. This is clear from reading the opinion of the District Court.)

The most careful reading of Appellants' Brief fails to disclose any statement of the invention alleged to be patented by claims 17, 18 or 19 of the Lorraine reissued patent in suit. Nowhere do plaintiffs even attempt to define such alleged invention.

This might most properly be taken as a frank confession that the entire theory upon which the application for the reissue of the original Lorraine patent was predicated, was without substance or foundation. It is a most frank confession that plaintiffs' theory of the Lorraine invention,—upon which theory the case was tried in the District Court,—is without foundation and unsustainable.

In response to defendants' motion for further particulars, plaintiffs stated that they alleged claims 17, 18 and 19 to be infringed, and stated:

> "That plaintiff asserts that the novel features set forth in each of said claims is an oil and gas separator arranged for maintaining the oil level above the vertical center of said separator, by means of a float operating in the upper portion of said receptacle and controlling the oil discharge." (Plaintiffs' Bill of Particulars, Par. III—R. p. 39.)

In the same bill of particulars, plaintiffs say:

> "That the Specification of Plaintiff's original Letters Patent was defective and insufficient, in that it failed to describe and claim the arrangement for maintaining the oil level above the vertical center of said separator." (Plaintiffs' Bill of Particulars, Par. VIII—R. p. 40.)

Why plaintiffs have abandoned this theory is unexplained in Appellants' Opening Brief. Plaintiffs cannot, however, escape from the solemn admission thus made that the original Lorraine patent 1,373,664

"failed to describe and claim the arrangement for maintaining the oil level above the vertical center of said separator." A comparison of the descriptive portion of the specification of the reissued patent fails to disclose any better description of such "arrangement."

However, there have been added to the reissued patent three claims, numbered 17, 18 and 19.

In claim 17 a functional clause is appended, which does not describe any structure or device or element or any feature of construction by which the function is accomplished. Said functional statement is: "whereby a substantially uniform volume and level of oil may be maintained in said settling chamber at a point above the vertical center of the receptacle." The same is true in regard to claim 18. In claim 19 the float is defined as "a float in the upper portion of said receptacle."

The theory upon which the case was tried in the District Court was that the Lorraine invention resided in maintaining a high oil level in the separating trap. This theory is consistent with plaintiffs' bill of particulars. It is consistent with the total absence of any reference in the original patent to any oil level or to the maintenance of a high oil level in the trap; consistent with the total absence in the original patent of any advantage or function sought or subserved by any such high oil level. Yet, plaintiffs' bill of particulars admits and proclaims that the reason for the reissue was that the specification of the original patent "was defective and insufficient, in that it failed to describe

and claim the arrangement for maintaining the oil level above the vertical center of said separator."

That the theory of the trial in the lower court was that the Lorraine invention resided in maintaining a higher level of oil in the trap than had theretofore been maintained in gas traps, is reflected in the opinion of the District Court. Judge James says:

> "Because the owners of the Trumble patent, at a date subsequent to the issuance of the Lorraine patent, cut out the lower baffle plates and adjusted their float so that a higher level of oil might be maintained within the cylinder, Lorraine insists that infringement has resulted. He claims equivalency for his segmented chamber in the additional space provided by the cutting out of the Lorraine baffles. He claims that the raising of the oil level to a mean height within the container adopts his inventive idea. In view of what has been said regarding the state of the art in this field, it is plain enough that, so far as arrangement of the interior chamber is concerned, without his segmented compartment Lorraine's device would disclose no originality. The addition of his compartment, as is true also of the baffle plates of Trumble, marks but a small advance over devices well known and in prior use. This first claim of Lorraine's, therefore, should be dismissed as without merit.
>
> "If the second claim—that the raising of the height of the oil in the receiving chamber worked such a great improvement in gas traps as to indicate inventive novelty—is upheld, that conclusion must be declared in the face of the fact that neither singly nor collectively are any different

adjuncts required in raising the oil level than at all times have been parts of the Trumble assemblage. In operating the trap, the liquid is required to be drawn off through an aperture at the bottom or side of the receptacle. The float in the inner chamber, operating upon the outlet valve, opens or closes it as the liquid rises or falls. This feature is common to Trumble, Lorraine and other preceding patents. The gas is carried out at the top or roof of the receptacle, but if the fall of the liquid is so great as that the level reaches the line of the outlet, the gas will blow out and mingle with the oil until the liquid level again rises to seal it. To guard against the latter contingency, the common expedient which would occur to the mind of any intelligent observer would be to raise the oil level by arranging the float device so that the oil outlet valve would close before the fluid level fell far enough to allow the gas to blow out. It can easily be seen that the second claim of Lorraine involves only a matter of adjustment and not of novelty of device. And it was clearly shown by the evidence that the most successful operation of a gas trap, as to the particular last discussed, does not depend upon the oil being carried at about the middle of the receptacle or at any particular or specific height. In its practical working the height of the receptacle may be extended and leave the oil level far below the middle line. And this is equally true of either the Lorraine or Trumble device." (R. 1114-1115.)

If "the raising of the oil level to a mean height within the container" is the inventive idea sought to

be patented in and by claims 17, 18 and 19, or either of them, then such claims are void as new matter and as being for an invention for which the original Lorraine patent was not granted. The reissue statute does not permit a patent to be reissued for a different invention from that for which the original was granted. We will later discuss this principle further.

That the issue of fact in the trial of this cause in the District Court pertained to such asserted invention of a high oil level in the trap, is demonstrated by the oral testimony in the case. It is demonstrated by the fact that such was the assertion in Mr. Lorraine's own testimony educed by his counsel. It is demonstrated by the testimony of defendants' witnesses Earl W. Bailey (R. 298-352; 359-361); C. W. Cooper (R. 677-713); A. J. Gutzler (R. 267, 440-530); J. C. Mackintosh (R. 353, 366-375); William McGraw (R. 95); Charles E. Miller (R. 406-410); Thomas F. Morgan (R. 533-637; 1105-1106); Paul Paine (R. 799-854; 1107); Francis M. Townsend (R. 563-626); Milon Trumble (R. 716-728); E. M. Zoeter (R. 418-422).

The testimony of these witnesses shows that the defendants commenced manufacturing and selling the Trumble gas traps in 1914 (R. 457). Defendants' Exhibit F shows the Trumble gas trap as made and sold by defendants from January, 1915, to about the latter part of 1919 (R. 268). This exhibit shows that means were provided upon all these early Trumble gas traps for regulating the oil level carried in the trap. A wide range of adjustment was provided.

This adjustment was made by adjusting the connection of the float arm or lever B upon the stem or arm E of the valve. In this Exhibit F five different adjustments are indicated. The round circles indicate the holes in which the pivot pin may be placed to connect the float lever or arm B on the valve stem or arm E. The valve by this connection was so arranged as to fully open when the float was raised to its uppermost position by the oil rising in the trap, and the valve was fully closed when the float assumed the position shown in this blue print, Defendants' Exhibit F. This valve controlled the outlet of oil from the trap. It was the oil discharge outlet. Mr. Gutzler said:

> "These are adjustments for the men in the field to carry the oil level higher or lower, as they please * * *." (R. 269.)

The testimony of defendants' other witnesses fully corroborates this testimony. There is no disputing the fact that the defendants' Trumble gas traps *from 1915* on were provided with this means for adjusting or regulating the float so as *to regulate as desired* the quantity of oil which must be in the trap before the valve would be entirely open. This testimony of Mr. Gutzler is corroborated by the testimony of Mr. Townsend, Mr. Trumble, Mr. Paine, Mr. Cooper, and others.

Defendants' Exhibit N is a blue print of one of the original tracings made by defendants October 1, 1915. This tracing was a working drawing produced for the

making of Trumble traps by defendants in 1915, 1916 and the succeeding years. This blue print also shows this same means for adjusting the position of the float and thereby adjusting the level of oil carried in the trap.

Defendants' Exhibit YY is a print of a working drawing made February 13, 1919, by defendants. Traps of this construction were made and sold as early as the forepart of 1919. This exhibit also shows the adjusting mechanism referred to. This print is also of interest as illustrating the change made in the Trumble gas traps when the oil operators changed to resting the traps directly on the ground, instead of mounting these traps upon long, high stand-pipes as illustrated in Defendants' Exhibit AA, photographs of the Midway-Northern Oil Company's Trumble gas trap No. 125, shipped by defendants October 8, 1915 (R. 235). The adjusting means referred to can be clearly seen in both of the photographs forming this exhibit. When the oil company's operators commenced setting their gas traps on the ground, there was no longer any use or necessity for the conical shaped bottoms such as had been previously provided on the Trumble gas traps. These conical bottoms are illustrated in Defendants' Exhibits P, N and YY. To permit the defendant Trumble's traps to be mounted directly on the ground, a bumped bottom was provided on the traps. This is illustrated on Defendants' Exhibit YY by the chalk-marks indicated by the initials "F. M. T." thereon. The cup of the bottom portion of the trap proper was thereby slightly enlarged. But

the location of the mounting of the oil valve and of the float was unchanged. This is brought out in Mr. Townsend's testimony (R. 624). No change at all was made in the mode of operation or the function of the trap by this change.

Other photograph exhibits of 1915 made and sold Trumble gas traps with this float and valve adjustment clearly shown, appear in Book of Exhibits, pp. 235, 236, 250, 252, 253, 254, 255 and 256. Different adjustments of the float lever and its connection with the valve lever and stem are shown in these photographic exhibits. Many of them show the traps as in actual use with the adjustment such as to maintain a relatively high level of oil in the trap, that is to say, a level of oil above the mid-vertical center of the trap. These facts are clearly brought out in the testimony of defendants' respective witnesses. The dates of manufacture, shipment and installation are fully proved. In fact, there is no substantial dispute in regard to these facts; and it would seem that plaintiffs' abandonment of the theory upon which they tried this case in the District Court is because of this abundance of proof.

Defendants' Exhibit P is another blue print from the original working drawing made June 12, 1916, of Trumble gas traps constructed at that time. This exhibit also shows this float adjustment mechanism and shows a trap in which the oil level may be maintained in the trap above the mid-vertical center of the trap. It was upon the testimony of defendants' witnesses

and these exhibits of blue prints of the original drawings made in the years 1915-1919, and these photographic exhibits of the actual old Trumble traps made and installed during these years, that the District Court found:

> "* * * that the raising of the height of the oil in the receiving chamber * * * involves only a matter of adjustment and not of novelty of device. * * * And this is equally true of either the Lorraine or Trumble device." (See Judge James' opinion—bottom p. 1114 and p. 1115.)

The evidence and proof was conclusive upon this issue. So conclusive that in Appellants' Opening Brief this finding of fact by the District Court is not challenged. We shall, therefore, not burden this Court with a recitation of the testimony in detail nor refer to other and additional exhibits in support thereof. Should the Court deem there to be any occasion therefor, a careful examination will show that the proof is overwhelming.

The result of this proof upon this law suit is this:

It is established—demonstrated beyond peradventure of doubt—that defendants have been manufacturing Trumble gas traps of the type and construction and interrelation of parts and mode of operation illustrated in these working drawings—corresponding as they do substantially with the Trumble patent—since 1915. The same have been on general sale and in general use not only in California, but in other oil-

fields of the United States and in foreign countries. Defendants' said traps, manufactured and sold years before Lorraine's application for his original patent and years before his alleged invention, contained every substantial element of the Trumble gas traps sought to be held as an infringement of the Lorraine reissued patent.

Viewed, therefore, from every angle, a perfect defense has been made out.

If claims 17, 18 and 19 of the Lorraine reissued patent are construed so as to embrace within them or either of them any of defendants' traps, such claims must necessarily be held void, *because whatever the inventive idea so claimed be found to be,* such construction and interrelation of elements was old and in common use years prior to Lorraine's alleged invention and more than two years prior to his application for the original patent.

This brief, and the presentation of a full justification for the decree appealed from, might end here. This evidence and these exhibits completely justify the opinion and conclusions of the District Court. However, should the Court be interested in further considering all of the defenses existent,—some of which were not passed upon by the District Court,—we shall further develop such defenses.

In Appellants' Brief plaintiffs have contented themselves by taking an advertisment cut of one of defendants' Trumble gas traps. This cut is not to scale and was for advertising purposes only, and is shown

not to be accurate. Nevertheless, plaintiffs content themselves with a mere literal application of the words of claims 17, 18 and 19 to this cut. They assert:

> "* * * the language of the claims is so clear and its application to defendants' device so obvious that additional description would seem superfluous." (Appellants' Brief, p. 4.)

And:

> "Most briefly, the court will find the situation to be this: *Defendants make and sell a device which is exactly described by the language of each of the claims in suit; every element of each of these claims literally as described therein is found in defendants' device and each of said corresponding elements performs the same function in the same way and leads to the same result as does the corresponding element and combination of the claims in suit."* (Italics plaintiffs'.) (Appellants' Brief, p. 8.)

Plaintiffs' application of the language of these claims to the advertising cut of defendants' trap is without any reference or regard whatever to the meaning of such language in the Lorraine reissued patent. Plaintiffs take the literal words, but they do not construe these claims in any manner with regard to the subject-matter of the Lorraine patent, to which they are addressed. Thereby they fall into a most common error.

The Supreme Court, in Westinghouse v. Boyden Power Brake Co., 170 U. S. 568, had before it the pioneer patent upon the Westinghouse air brake. In

that patent the claims were in the most general and broadest language. It was asserted that the claims read on the defendant's device literally. The Court found that the Boyden brake worked on a different principle and that, although the words of the claim read literally on defendant's device, there was no infringement. The Court said:

> "But even if it be conceded that the Boyden device corresponds with the letter of the Westinghouse claims, that does not settle conclusively the question of infringement. We have repeatedly held that a charge of infringement is sometimes made out, though the letter of the claims be avoided. (Citing cases.)
>
> "The converse is equally true. The patentee may bring the defendant within the letter of his claims, but if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he is as little subject to be adjudged an infringer as one who has violated the letter of a statute has to be convicted, when he has done nothing in conflict with its spirit and intent. 'An infringement,' says Mr. Justice Grier in Burr v. Duryee, 68 U. S. 1 Wall. 531, 572, 'involves substantial identity, whether that identity be described by the terms 'same principle', same '*modus operandi*', or any other. * * * The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term 'equivalent'."

Patents are not granted for mere words. The Lorraine reissue patent is for a machine. The several mechanical elements and their law of cooperation, relation and principle of operation or co-action, is the distinguishing feature.

As said by the Supreme Court in Rubber Tip Pencil Co. v. Howard, 20 Wall. 498:

> "An idea of itself is not patentable, but a new device by which it may be made practically useful is. The idea of this patentee was a good one, but his device to give it effect, though useful, was not new. Consequently he took nothing by his patent."

In making his application for patent Mr. Lorraine describes a specific structure having by virtue of the particular construction and the inter-relation of its parts a certain definite, well defined specific mode of operation. In the reissued Letters Patent this mode of operation and the functions of the elements are most fully set forth. Mr. Lorraine names this structure and its cooperating parts. Mr. Lorraine uses the denomination "receiving chamber" as a term adopted by him to designate a specific thing. He has defined in the specification what that thing is. He uses the name "settling chamber" to denominate a particular thing. He stresses in his specification the functions of such a "settling chamber" and its cooperative law in association with *his* "receiving chamber".

In construing such claims, therefore, care must be taken to give to such "receiving chamber" and "set-

tling chamber" the construction, attributes, functions and cooperative inter-relation comprehended by Mr. Lorraine's description from which he has named the same. In judging infringement these terms "receiving chamber" and "settling chamber" must be read with Mr. Lorraine's meaning and must be read to differentiate from the prior art. A slavish literal word application of these terms to defendants' traps cannot be made. Appellants' brief relies upon such a slavish literal application and disregards wholly and totally the meaning of these terms in the claims when interpreted to mean that to which Mr. Lorraine addressed them.

The claims of a patent are supposed to be a definition of the device or machine. As said in Edison v. American Co., 151 Fed. 767, at p. 773:

> "The language, even of the reissued claims, considered by itself and giving no force to the words, 'substantially as set forth,' may be broad enough to cover it; but that is not sufficient. 'Infringement should not be determined by a mere decision that the terms of a claim of a valid patent are applicable to the defendant's device. Two things are not precisely similar because the same words are applicable to each. The question of infringement involves considerations of practical utility and of substantial identity, and therefore must be quantitative as well as qualitative.' Goodyear Shoe Mach. Co. v. Spalding (C. C.), 101 Fed. 990."

As said in Bates v. Coe, 98 U. S. 31:

> "Devices in one machine may be called by the same name as those contained in another, and yet they may be quite unlike, in the sense of the patent law, in a case where those in one of the machines perform different functions from those in the other. In determining about similarities and differences, courts of justice are not governed merely by the names of things, but they look at the machines and their devices in the light of what they do or what office or function they perform, and how they perform it, and find that a thing is substantially the same as another, if it performs substantially the same function or office in substantially the same way to obtain substantially the same result; and that devices are substantially different when they perform different duties in a substantially different way, or produce substantially a different result. Cahoon v. Ring, 1 Cliff. 620."

When each of claims 17, 18 and 19 are construed in the light of the disclosure of the drawings and description of the Lorraine reissue patent, the defendants' device fails then to respond to either of such claims in the same sense or meaning.

A few examples will suffice. Claims 17 and 18 call for "a receiving chamber therein for the reception of oil and its constituents". In the Lorraine patent, this is the initial chamber formed between the vertical partition 19 and the wall of the trap. We have heretofore pointed out the functions and mode of operation of this chamber as denominated in the Lorraine

specification. Each of these claims also calls for "a settling chamber communicating with said receiving chamber". The kind, formation, and cooperative interrelation of these two chambers is fully stressed in the Lorraine patent specification. (See specification of the Lorraine reissued patent, p. 1, lines 58-71; p. 1, lines 71-84; p. 2, lines 94-115; p. 4, lines 106-127.) No comparable receiving chamber or settling chamber exist in the Trumble device, nor does there exist in defendants' trap any such interrelated receiving and settling chambers co-operating as described in the Lorraine patent. Clearly, these claims are limited to the specific construction shown in the Lorraine patent drawings and described in his specification. Necessarily they are limited to a combination in which such receiving chamber and such settling chamber are so interrelated as to have the functions and mode of operation and effect the purposes set forth in the Lorraine specification.

Each of claims 17 and 18 end with a functional clause: "whereby a substantially uniform volume and level of oil may be maintained in said settling chamber at a point above the vertical center of said receptacle." Merely maintaining a substantially uniform volume and level of oil at a point above the vertical center of the receptacle, has no useful function or attribute. This clause of the claim has no foundation in the descriptive specification of the Lorraine patent. The evidence conclusively shows that it is immaterial whether or not the level of oil is

maintained in the trap at a point above the vertical center. The evidence conclusively shows that the essential thing is that oil should be maintained above the outlet through the oil outlet valve. The reason for this is to provide an oil seal so that the gas from the well may not blow directly into the oil line. It is obvious that whether a sufficient oil seal is provided within the trap depends solely upon the operative conditions. The higher the pressure of gas entering the trap in the well, the greater the requirements for oil seal are. It was for this very purpose of adjusting such oil seal that defendants provided all of their traps with the means for adjusting the connection between the float lever or arm and the oil outlet valve stem. But it is immaterial whether such oil seal be carried below, at or above the mid-vertical center of the trap. This is clearly proved by the evidence, and sustained by the findings of the District Court that:

> "In its practical working the height of the receptacle may be extended and leave the oil level far below the middle line. And this is equally true of either the Lorraine or Trumble device."

If, however, any invention could be found in maintaining a substantially uniform volume and level of oil in the settling chamber at a point above the mid-vertical center of the receptacle, such invention was not described or disclosed in the original Lorraine patent or attempted to be patented therein or thereby. On the contrary, plaintiffs admit:

> "That the Specification of Plaintiff's original Letters Patent was defective and insufficient, in

> that it failed to describe and claim the arrangement for maintaining the oil level above the vertical center of said separator." (Plaintiffs' Bill of Particulars, Par. VIII—R. 40.)

Thereby plaintiffs admit that which is a fact, i. e., that so construing the invention and these claims to exist in the maintenace of the mid-vertical center of the oil in the trap, these claims are not addressed to the same invention attempted to be patented in and by the original patent.

As said in Parker & Whipple Co. v. Yale Clock Co., 123 U. S. 87:

> "In these extracts from the opinion it is seen that the court adheres strictly to the view, that, under the statute, the commissioner has no jurisdiction to grant a reissued patent for an invention substantially different from that embodied in the original patent, and that a reissue granted not in accordance with that rule is void. * * *
>
> "In the present case, there was no mistake in the wording of the claim of the original patent. The description warranted no other claim."

See also:

> Eachus v. Broomall, 115 U. S. 429;
> Heald v. Rice, 104 U. S. 737.

In Carpenter Straw Sewing Machine Co. v. Searle, 52 Fed. 809, at 814, Judge Coxe says:

> "These quotations, which have perhaps been multiplied unnecessarily, leave no room for doubt that unless the court can find that the invention

of the reissue is described as the invention in the original, and that the patentee intended to secure it as his invention in the original, the reissue is invalid,—it is not for the same invention. The question is not what the patentee actually invented, but what he said about it in the original, and if it appears from the original that the invention of the reissue was an afterthought not described or intended to be claimed, the reissue falls."

Plaintiffs' bill of complaint alleged in Paragraph V (R. 6) that the original letters patent "were inoperative and invalid by reason of the defective and insufficient specification therein". Defendants-appellants for particulars asked:

> "8. Precisely wherein the specification of plaintiffs' original Letters Patent was defective and insufficient as referred to in Paragraph V of the Bill of Complaint herein." (R. 16.)

Plaintiffs then pleaded by plaintiffs' bill of particulars that the original patent failed to describe and claim the arrangement for maintaining the oil level above the vertical center. This admission is an admission that the facts are within the rule of the authorities above cited; that if the invention comprehended by the claims in suit is predicated upon the maintenance of a substantially uniform volume and level of oil in the settling chamber at a point above the vertical mid-center of the receptacle, then this was not for the same invention as patented in the original patent, but for a different invention, and these claims

of the reissued patent are void. There would seem to be no escaping from this conclusion. Plaintiffs' admission is supported by the original patent.

It is well established that a patent on a mere difference in degree of the use of the principle shown in the prior art is invalid.

> Smith v. Nichols, 21 Wall. 112;
> Grant v. Walter, 148 U. S. 547, 553;
> Burt v. Evory, 133 U. S. 349;
> Market Street Railway Co. v. Rowley, 155 U. S. 621;
> Fox v. Perkins, 52 Fed. 205;
> Calvin v. City of Grand Rapids, 53 C. C. A. 165, 115 Fed. 511;
> Eames v. Worcester Poly. Institute, 123 Fed. 67.

As said by the Supreme Court in Atlantic Works v. Brady, 107 U. S. 192:

> "It was never the object of those laws to grant a monopolv for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacturers. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing

> anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to law suits and vexatious accountings for profits made in good faith."

In fact, claims 17, 18 and 19, if read as asserted in appellants' brief, fall clearly within the denunciation of the Supreme Court in Carlton v. Bokee, 17 Wall. 463:

> "All these things exist in the Stuber burner except one. In that burner the wick tube and the dome are not directly connected together. The dome is first connected with the gallery and the gallery with the wick tube. So that the claim is reduced to the same thing which was claimed in the original patent. The same may be said of the second and third claims. If they mean anything more than the claim in the original patent they are void. Being identical with that they are needlessly multiplied, and by exhibiting a seeming of claims to which Reichmann was not entitled they are calculated to confuse and mislead. We think it proper to reiterate our disapprobation of these ingenious attempts to expand a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalizations and ambiguous language to discourage further invention in the same department of industry and to cover antecedent inventions."

In the spring of 1921 defendants were modernizing their Trumble gas traps. The requirements of the gusher oil wells of the Santa Fe Springs, Huntington

Beach and Signal Hill fields were for gas and oil separating traps of larger capacity. This occasioned defendants to redesign their traps. Changes in sizes and proportions were necessary. Plaintiffs' Exhibit 8 is a blue print of a working drawing of such traps as were redesigned by defendants in February, 1921. Orders were taken for these traps in February, 1921, and they were sent out during that month. (Testimony A. J. Gutzler, Rec. p. 101.) The testimony of Mr. Townsend and Mr. Gutzler shows that immediately upon the issuance of the original Lorraine patent on April 5, 1921, this patent was examined by Mr. Townsend, who is a registered patent attorney in the United States Patent Office and who had over twenty years experience in the procuring for inventors of patents before the United States Patent Office. He also submitted it to his attorneys. It was found that the five claims of said original Lorraine patent were precisely limited to the particular arrangement of receiving and settling chamber intercommunicating at the bottom, these chambers being formed by a vertical partition within the trap, and to the automatic or synchronized valve mechanism and its operation. The new large size Trumble gas trap illustrated in plaintiffs' Exhibit 8 did not contain any of these features. It was apparent to Mr. Townsend and he was so advised by his attorneys that said original patent did not in any manner cover or embrace this enlarged Trumble gas trap. That said trap did not infringe said original Lorraine patent. (This fact is conceded by plaintiffs. No

claim of infringement of said claims has ever been made.)

Relying upon this condition and scope of the Lorraine original patent defendants proceeded to put out these enlarged Trumble gas traps. Many of them were actually installed prior to the date of the application for the Lorraine reissue.

This enlarged Trumble gas trap (exemplified in plaintiffs' Exhibit 8) was a mere redesigning of the prior Trumble traps. Changes in size and proportion were made. Instead of a ball float a different form of float was used. But this was a mere redesigning of the trap. As said by the Supreme Court in Smith v. Nichols, 21 Wall. 112:

> "But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent."

Defendants used ordinary mechanical skill in determining the size and proportion of the parts.

Defendants relied upon the contract between the government and Mr. Lorraine exemplified in the original patent. Defendants invested their money and proceeded with their business of manufacturing these enlarged traps, relying upon non-infringement of said original Lorraine Letters Patent. This they had a right to do. The rule applied by this court in Supreme

Mfg. Corporation v. Security Mfg. Co., 299 Fed. 65, applies. This court said:

> "The appellant here has intervening rights as against the reissue, for it has acquired the right to manufacture and sell that which Ells failed to claim, and, having expended considerable sums of money in the manufacture of a device at a time when the original Ells patent was as yet unsurrendered, it cannot be held to infringe the added claims of the reissue. Ives v. Sargent, 119 U. S. 652, 7 Sup. Ct. 436, 30 L. Ed. 544; Autopiano Co. v. American Player Action Co., 222 Fed. 276, 138 C. C. A. 38; Diamond Drill Contracting Co. v. Mitchell (C. C. A.), 269 Fed. 261; Keller v. Adams-Campbell Co. (C. C. A.), 287 Fed. 838; Ashley v. Samuel C. Tatum Co. (D. C.), 240 Fed. 979. We find no conflict between these views and the decision in Abercrombie & Fitch Co. v. Baldwin, 245 U. S. 198; 38 Sup. Ct. 104, 62 L. Ed. 240, cited by the appellee. In the latter case it was held that the reissue did not enlarge the original patent, and the court was of the opinion that the original claims were sufficient in their scope to include, under the doctrine of equivalents, the more explicit claims of the reissue. It is manifest that in such a case there could be no loss of rights by delay in applying for a reissue, and there could be no impediment by way of intervening rights; the original claims being found sufficient to protect the whole invention of the patentee."

If, therefore, for the sake of argument, it could be conceded that claims 17, 18 or 19 of the Lorraine Reissue patent states a patentable invention, patentably

novel at the date of the application for the Lorraine original patent, and that such claims are not limited to the precise construction or inter-relation and co-action of the receiving chamber and settling chamber, etc., but could be construed to cover defendants' enlarged Trumble traps, like plaintiffs' Exhibit 8, defendants' intervening rights bar any suit by plaintiffs on such reissued patent against this defendant.

Conclusion.

In conclusion, therefore, defendants submit:

1. That the District Court was correct in its finding that if any invention existed in the Lorraine Reissue patent, such invention was limited to the precise details of construction of such "receiving chamber" and "settling chamber", so formed by the vertical partition 19, and to the automatic or synchronized valve mechanism. That the adjustment and regulation of the height of the oil level was a mere matter of degree and a mere matter of adjustment and did not rise to the dignity of invention

2. That if either claims 17, 18 or 19 of the Lorraine Reissue patent could be interpreted of sufficient breadth to embrace defendants' present Trumble traps, then each of such claims is void as fully and completely anticipated by the Trumble traps manufactured by these defendants commencing with the year 1915 and sold for years prior to the alleged Lorraine invention. That which infringes if subsequent, anticipates if prior.

3. That claims 17, 18 and 19 of the Reissued patent are void, if not limited to the specific "receiving chamber" and "settling chamber" of the Lorraine construction. This because, if not so limited, then such claims are for a different invention from that for which the original patent was constructed and granted. To so construe said claims would be to construe them for "new" matter. This is within the inhibition of the reissue statutes.

4. The cause of action attempted to be asserted by plaintiffs is barred by the intervening rights of the defendants.

5. The District Court was correct in holding non-infringement. Defendants' traps have not embodied in them any inventive idea produced by Mr. Lorraine. We submit that the District Court was correct in its conclusion that:

> "I have not considered it necessary to enter into a discussion of the functions of the segmented chamber of Lorraine, as compared with the baffle plates of Trumble. The feature of pressure maintained within the chamber is common to both, and not a matter involving a new idea. This is plainly pointed out in Lorraine v. Townsend, *supra*. Within the narrow limits left by a very much occupied field, I think that the segmented chamber and its arrangement in connection with the gas separation device is the only thing, aside from the synchronized valve, that may be said to entitle the Lorraine patent to a claim of validity.
>
> "I find that the charge of infringement is not sustained." [R. 116.]

We respectfully submit that the decree dismissing the bill and the supplemental bill was correct and should be affirmed.

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No. 4582.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

4

David G. Lorraine, and The Lorraine Corporation, a corporation,

Appellant.

vs.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, doing business under the firm name of Trumble Gas Trap Company,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

The Only Questions on This Appeal Are:

Has Plaintiffs' Presumptively Valid Patent Been Infringed?

Has the Presumption of the Validity of the Claims in Suit Been Overcome?

There Is No Issue Arising or Growing Out of Prior Litigation Between the Parties; Nor Is Any Question as to the Construction of Defendants' Trumble Patent Material Here.

The alleged history of the suit on the Trumble Patent to which counsel, commencing on page 4 of ap-

pellees' opening brief has devoted so much attention does not aid in disposing of the case at bar. We disagree with the accuracy of the statement in many respects, and particularly with some of the inferences drawn therefrom, but shall not consume the time of the court in correcting what we believe will instantly be seen to be immaterial.

However, the court will notice the subtle attempt on the part of appellees (page 4, Appelles' Opening Brief) to transform the patent in suit into a mere improvement in valve mechanism: After stating at the top of page 4 of said brief that the patent in suit *refers* to improvements in gas, oil, and sand separators, near the bottom of the same page counsel implies that the patent is really on a valve mechanism. The fact is that two of the claims charged to be infringed, namely, 17 and 18 of the Lorraine Reissue Letters Patent in suit do not even mention a valve mechanism, and the remaining claim (19) only refers to a valve as a small part of a combination of elements such as the two chambers, float, etc. It is true that one of the valuable contributions to the art is the Lorraine synchronously operated valves, which combination is covered by claim, 3 for instance, of the Lorraine patent; but this claim is not charged to be infringed.

What difference does it make in the present proceedings which claims of the Trumble patent in prior litigation were charged to be infringed and what the court found with respect thereto,—except to show that defendants have a patent which has been sustained by

this court and which defendants could, if they saw fit, use without infringing upon the exclusive rights of Lorraine?

We solemnly assure the court that it is not true, as stated by counsel at page 6 of appellees' opening brief that the business of plaintiff "had its incipiency in the piracy of defendant-appellees' patent rights:" but for the sake of argument let us assume that the statement *is* true, and as further to be inferred from counsels' remarks that plaintiffs have paid the penalty for such wrong doing. * * * Shall defendant-appellees now be permitted to *maintain* their business by piracy on plaintiff-appellant's rights *and escape without paying the penalty,* or shall the court follow its usual practice by an earnest attempt to right the present wrong?

Counsel is presuming a great deal in the assertion (Appellees' Opening Brief, bottom p. 6) that the filing of the present suit for infringement was designed to have some mysterious effect on the Trumble trial and upon the trade. The fact is "the shoe was on the other foot": it was defendant-appellees in their advertisements who misrepresented the scope and effect of the injunction entered in compliance with this court's direction,—attempting to make it appear that Lorraine was prohibited from selling traps which were plainly non-infringements,— but these things are not in issue before this court in the present proceeding; their consideration only confuses the issue,—so why allow ourselves to be diverted from the *real* issues by them. Such subtle attempts to create prejudice should

not confuse the court. Again we urge that the issue is simply: *has our presumptively valid patent been infringed?*

While there is no doubt but that defendants feverishly examined the Lorraine patent immediately after its issue, and possibly were advised by their counsel that they did not infringe (as stated in Appellee's Opening Brief, p. 7) the original claims, and while such fact is not at all material here, nevertheless they were *prior* to that time actually copying the Lorraine trap and necessarily utilizing the subject-matter of the Reissue claims here in suit which were thereafter allowed.

It is not material whether or not, as counsel has stated on page 8 of appellees' opening brief, the Lorraine patent was limited to the valve mechanism. Nevertheless, it is *not* an admitted fact, as erroneously stated by counsel. It only requires a brief reference to the claims of the original Lorraine patent numbers 1 and 2, for instance, to show that such statement is in error.

A Flood of Blue Prints Does Not Under the Law Prove Prior Knowledge of a Device nor Does It Prove Prior Use (Even If Adequately Illustrating the Combination of Claims in Suit) Any More Than Numerous Plans to Commit a Murder Would Establish That the Crime Had Been Consummated.

If a Natural Person Instead of Our Patent Were on Trial for His Life How Carefully This Court Would Guard Against the Influence of Prejudice, the Unsupported Assertions of Counsel, and Findings, Express or Implied, Not Firmly Based Upon Unassailable Evidence. Clear, Definite, Unmistakable Proof to a Moral Certainty Would Undoubtedly Be Required by This Court to Sustain Any Such Conviction; for Enforcement of the Forfeiture of Human Life Is the Gravest of Judicial Responsibilities. * * * and the Law Holds the Same Shield of Protection Over Our Patent.

That proof of invalidity of a patent should be to a moral certainty was decided by this Honorable Court (Judges Gilbert, Morrow and Wolverton) in San Francisco Cornice Co. v. Beyrle, 195 Fed. Rep., 516, and the rule has been applied in many other cases by Your Honors, one of the latest of which being Schumacher v. Buttonlath Mfg. Co., 292 Fed. Rep. 522.

That "beyond a reasonable doubt" means the same thing in a patent cause as it means in a murder trial was decided in Nicholas Power Company v. G. R. Baird Company, 222 Fed. Rep. 933 (bottom of p. 941).

As a single murder would justify infliction of the death penalty, so a single prior use would warrant a decree of invalidity of our patent. The presumption of validity in a patent cause being like the presumption of innocence in a criminal proceeding, this court has held (Schumacher v. Buttonlath, *supra*) that such most heavy burden of proof *is upon him who denies validity.* Under the circumstances, what the court should expect from the four most able patent counsel who sign defendant-appellees' opening brief, and from their client, Townsend, who is also a patent attorney (all exceedingly well versed in the laws of evidence in patent causes and particularly cognizant of the requirement of proof beyond a reasonable doubt to defeat a patent) is—not rolls of blueprints seemingly accompanied by the grandiloquent suggestion that there *may have been* almost too many prior uses to mention —not general assertions as, for instance, what the proofs "fully show" (Appellees' Opening Brief p. 7) or what is "demonstrated by the oral testimony (Appellees' Opening Brief p. 27)—not a mere wave of the hand in the direction of a number of witnesses with a study-the-record-diligently-and-you-may-dig-out-sufficient-support-for-our-assertions attitude. Such tactics on the part of the defense should not satisfy the court to a *moral certainty* that anticipation has been established.

We emphatically deny, for instance, that "no changes whatever have been made in the co-operative relations of the various elements of the Trumble trap" since the invention of the claims in suit, as asserted by

counsel (Appellees' Opening Brief, bottom p. 10). Why did counsel neglect to tell us who testified to such fact?

We deny the truth of counsel's statement (Appellees' Opening Brief, p. 27) that it is "demonstrated by oral evidence in the case" that the high oil level, *per se,* was the invention of the claims in suit. (We hereafter in this brief point out distinctly, positively, and unmistakably *why* this feature is not the invention.)

We also deny, as stated near the bottom of page 27, appellees' opening brief, that the early Trumble Traps were provided with means for regulating the oil level carried in the trap; and deny that "wide (or any substantial) range of adjustment was provided." (As we shall show, a blue print or drawing is not sufficient proof under the law of prior knowledge or use.)

We deny that testimony corroborating Gutzler (himself a party and consequently biased) as to what the blue prints represent is under the law sufficient.

Why, with the heavy burden of proof to a moral certainty upon defendants did not counsel point out where any witness had testified that such trap with such adjusting means was actually made or used?

Beginning near the top of page 38 appellants' opening brief, we discussed the nature of the evidence as to the alleged prior uses and explained fully the utter collapse of such evidence on rebuttal. It is important to notice that although our brief was served, as required by the rules, twenty days before the hearing, and although the defense of prior use was *vital to the*

defense, our version of the state of the record on this point has not been questioned.

Present day photographs (Appellees' Opening Brief, p. 30), still less than blue prints or drawings establish what was used prior to our date of invention. Why rely upon photographs when hundreds of Trumble traps were actually sold? As we have before remarked separation are not of a perishable nature. Scores of witnesses who actually used them could have been called as witnesses to prove the actual construction, mode of operation and use if they had actually been made and used.

Shall counsel's assertion (Appellees' Opening Brief, p. 31) that "evidence and proof was conclusive," that "it is established—demonstrated beyond peradventure of doubt—that defendants have been manufacturing Trumble gas traps of the type and construction and interrelation of parts and mode of operation illustrated in these working drawings"—be accepted in place of evidence that the actual traps were installed and used and made and operated in accordance with the blue prints (assuming for the moment and for the sake of arguments that any of the blue prints show the *complete* combination of our claims in suit.)

Remember that when defendants endeavored to *prove* such use they utterly failed as we have shown in appellants' opening brief, p. 39.

Again at the bottom of appellees' opening brief, p. 32, counsel, referring to the advertising cut of one of defendants' traps reproduced opposite page 5 of appel-

lants' opening brief, say: "This cut is not to scale and was for advertising purposes only and is shown not to be accurate." We deny the truth of this statement. Why did counsel attempt to substitute their own mere assertion. How easy it would have been to point out the *proof* if it existed.

What the court should expect from counsel for defendant-appellees are clear, responsive, pointed answers to the following questions: Was there actually a prior use? Where? By whom? Who says so? What is his interest in the controversy? How is he corroborated? What happened to his story on rebuttal? (As before stated, we answered this last question on page 38 appellants' opening brief, and counsel has not questioned the correctness of our answer.)

The fact that blue prints, drawings, or even models illustrating the subject-matter of the claims in suit were made, is not defense to a Patent cause.

Walker on Patents (5th Ed.) Sec. 61, states the law (citing many cases in support of the text) as follows:

> "Sec. 61. Novelty of a machine or manufacture, is not negatived by any prior unpublished drawings, no matter how completely they may exhibit the patented invention (citing many cases), nor by any prior model, no matter how fully it may coincide with the thing covered by the patent. (Citing cases.)
>
> "The reason of this rule is not stated by fullness in either of the cases which support it, but that reason is deducible from the statute and from the nature of drawings and of models. The

statute provides, relevant to the newness of patentable machines and manufactures, that they shall not have been previously known or used by others in this country. (Citing Revised Statutes, Section 4886.) Now, it is clear that to use a model or a drawing is not to use the machine or manufacture which it represents; and it is equally obvious that to know a drawing or a model is not the same thing as knowing the article which that drawing or model more or less imperfectly pictures to the eye. It follows that neither of those things can negative the newness required by the statute. Nor is the statutory provision on this point lacking in good reasons to support it. Private drawings may be mislaid or hidden, so as to preclude all probability of the public ever deriving any benefit therefrom; and even if they are seen by several or by many, they are apt to be understood by few or by none. Models also are liable to be secluded from view and to suffer change, and thus to fail of propagation. Moreover, if a patent could be defeated by producing a model or a drawing to correspond therewith, and by testifying that it was made at some sufficiently remote point of time in the past, a strong temptation would be offered to perjury. Several considerations of public policy and of private right combine, therefore, to justify the rule of this section.

"The word 'model' it should be noted as used in the foregoing connection is used in the limited sense of a 'pattern, a copy, a representation usually upon a reduced scale' and not in the sense of an operative structure identical with the structure of the patent." (Citing American Writing Machine Co. v. Wagner Typewriter Co., 151 F. R. 576, 1906.)

What Do We Assert to Be the Lorraine Invention in Question?

Why, the Combination as a Combination of Each of the Claims in Suit, of Course.

This Was Our Answer to the Same Question During the Trial (Near Bottom of R. 72, et seq.)

After we have definitely charged infringement of three specifically mentioned claims of the Lorraine Reissue Patent, namely, claims 17, 18 and 19, what can be the purpose of counsel at middle of page 11 of appellees' opening brief in asking and emphasizing by italics, "*What is the asserted Lorraine invention which defendants are claimed to have infringed?* Every one of the four eminent patent counsel who joined in this statement by signing appellees' opening brief, have actually prosecuted many applications for patents, and have no doubt drawn hundreds of patent claims. They all know, as they know their own names that the claims (Walker on Patents, 5th ed., Sec. 176) "are necessarily inserted to conform to the statutory requirement that the patentee shall distinctly point out and distinctly claim the part, improvement, or combination which he claims as his invention" (R. S. U. S. 4888); or as decided by the Supreme Court of the United States in, for instance, Continental Paper Bag Company v. Eastern Paper Bag Company, 210 U. S., 405, "the claims measure the invention." They also know that each claim of a patentee is treated as setting forth a complete and independent invention (Walker on Patents, 5th Ed., Sec. 177, p.

226, citing many cases); that the claim is the definition of the invention (Hopkins on Patents, p. 120), and is the definition agreed upon by the inventor and the Patent Office; and that (same reference) "the claim defines the metes and bounds of the inventor's accomplishment;" or, in the words of Mr. Justice Bradley, in White v. Dunbar, 119 U. S. 47, the claim "is a statutory requirement for the purpose of making the patentee (applicant) define precisely what his invention is," to which Judge Wallace in Thomson-Houston Elec. Co. v. Elmira and H. Ry. Co., 71 Fed. Rep. 396, has added: "so distinctly and exactly as to apprise other inventors and the public what is withdrawn from general use." Counsel is also familiar with the decision of this court in Santa Clara Valley Mill and Lumber Company v. Prescott, 102 Fed. Rep. 501, where Judge Gilbert speaking for the court said:

> "The object of the claim in a patent is to publish to the world the precise nature of the invention the patentee seeks to protect."

Counsel well knows that we cannot rely merely upon one of the incidents, features, or elements of the claim because there is no such thing in the law as infringement of an element or feature of a claim, as the omission in defendants' device of a single one of the elements of the claim defeats a charge of infringement of that claim (Hopkins on Patents, p. 342, *et seq.*) and because each element of the claim or any sub-combination of elements mentioned in the claim less than the whole is presumed as a matter of law to be old (Hopkins on Patents, p. 214.)

Still less can we rely as a feature of novelty charged to be infringed on any feature, device, or element *not* part of the combination of the claims, because all elements, features, incidents, or devices or combinations described in the specification but not claimed are dedicated to the public, (Walker on Patents, (5th Ed.) Sec. 176, p. 221).

When, therefore, we are asked to specify the Lorraine invention which defendants are claimed to infringe, we can only reply "the combination as a combination of one or more or each of claims 17, 18 and 19 of the Lorraine Reissue Patent. If we should select a single element or incident or feature of the claim in place of the combination, such as the high oil level or more accurately the *means* for maintaining the high oil level, counsel will respond: "Why that is presumed as a matter of law to be old because you did not claim it separately but only in combination;" and if we specify a feature, device, element, or combination not mentioned in the claims, the reply will be, "that is dedicated to the public because you did not claim it."

With this elementary law (which is the very ground-work of their knowledge as patent attorneys), in mind, do not counsel come dangerously near trifling with the intelligence of court and opposing counsel, when, after we definitely specify the claims charged to be infringed, they solemnly charge us with (Appellees' Opening Brief, p. 12), evading a distinct and understandable answer to an inquiry as to what we claim

was the novel invention of Lorraine which has been "pirated" by defendants?

Most succinctly by way of summary: The Lorraine invention is the *combination* of elements mentioned in each of the claims in suit (each claim being in effect a patent by itself, Hopkins on Patents, pp. 119-121); that invention is not anticipated, because such combination *is not* found in any of the devices of the prior art; that invention is infringed by defendants because the combination of one or more or all of the claims in suit *is* found in defendants trap; that invention *is not* infringed by traps made in accordance with the Trumble patent because said combination is not found in said traps.

We Urge That Defendants Have Infringed Claims 17, 18, and 19 of the Patent in Suit, and Their Reply Is That They Have Not Infringed, for Instance, Claim 7 Calling, Among Other Things, for a Vertical Partition and Segmental Chambers, nor on Claim 3, and Others Which Are Limited Particularly to Valves.

A Defendant Is Charged With Burglarizing the House on the Corner, and His Defense Is That He Has Not Yet Robbed the Premises Next Door.

Beginning p. 13, appellees' opening brief, after a quotation suggesting that our patent is worthless—notwithstanding that defendants admittedly *do* use the combination of the claims in suit—counsel proceeds to

explain and enlarge upon the things of the Lorraine patent which defendants *are not charged with infringing,* namely, the vertical partition, segmental chamber, specially constructed float, synchronously operated valves, etc. These things are protected by claims *not* in suit. We agree with counsel that they are valuable contributions to the art, and congratulate defendants in resisting temptation to appropriate them without our license (if such is the actual fact at the present time); but as long as we are not contending in this proceeding that defendants *have* infringed any of the claims covering them, why squander the time and attention of the court with their consideration. We can agree that counsel have neatly and effectively knocked down and demolished their man of straw, but after having done so why not consider those things which we believe the court will instantly recognize as the *real* issues, such as: Do the claims in suit describe defendants' device? Does defendants' device contain the combination of elements of any of the claims in suit? Does difference in form and location of an element of a combination defeat a charge of infringement? Shall the broad claims in suit be so limited that they are practically co-extensive with other narrow claims? Shall the claims in suit be construed as broadly as permitted by the state of the art? etc., etc. Those were questions which we deemed vital to the merits of the present appeal presented in appellants' opening brief, and the court will note in appellees' brief (ostensibly in answer thereto) that their consideration has been most largely ignored.

The Partition Separating the Chambers Is Not an Element of Any of the Claims in Suit, Any Comparison of Functions of the Vertical Partition With the Functions of the Trumble Cone Is Therefore Immaterial.

Regardless of Difference in Form and Location, the Receiving Chamber and Settling Chamber of Both Trumble and Lorraine Perform Functions in Common Vital to the Lorraine Combination in Suit, Namely, Those of Receiving the Oil and Preventing Agitation of the Contents of the Settling Chamber.

There is no real difference in the mode of operation between the receiving chamber of defendants' trap and that of the Lorraine Patent in suit. The chamber merely receives the oil in both cases. Even if it be said that the receiving chamber of Trumble, by reason of the arrangement of its partition, performs any additional function, this does not, under the law, as we have shown in our opening brief, defeat a charge of infringement.

There may be advantages in the use of the vertical partition and there may be other advantages in the use of a cone as a partition, but inasmuch as the *means* for the separation of the chambers *is not an element,* consideration or comparison of respective functions (still less form and location) is immaterial.

The Subject Matter of Our Claims Disclose a High Order of Invention.

So Little Reliance Did Counsel Place in the Plausibility of Any Attack Upon Invention of the Subject-Matter of Our Claims That, as We Have Shown in the Quotation of Counsel's Statement of the Issues Before the Trial Court (Appellants' Opening Brief, page 9, R. 87) Not Only Was No Defense of Non-Invention Suggested, But Counsel Tacitly Admitted Invention by Repeatedly Referring to the Subject-Matter as an "Invention" and as "Lorraine's Invention."

That the Subject-Matter Did Involve Invention Has Been Adjudicated by the Patent Office by the Very Grant of the Claims in Suit; and to This Presumption Has Been Added the Fact That Defendants, Although Engaged in Manufacturing and Selling Gas Traps for Years Prior to Lorraine's Advent Into the Field, Did Not Discover nor Utilize the Subject-Matter Until Shortly Before the Grant of the Original Lorraine Patent.

Conclusion.

The smoke screen of ink and confusion is a favorite cover of error in combating truth.

When issues can be fairly met it is not necessary to substitute for their discussion long statements of immaterial matters, such as concerning prior litigation between the parties to this suit, the number of the claims involved therein, etc.

If a defendant has a valid defense of non-infringement of claims in suit, he will invariably—especially when represented by such numerous and able counsel as those for appellees in the case at bar—not assert that he is unable to understand what invention he is charged with pirating; nor will he confusedly devote pages of argument to an attempt to show non-infringement of claims which he is *not* charged with infringing. He will recognize instantly that when plaintiff specifies claims 17, 18 and 19 as the claims relied upon and charged to be infringed that this means that claims 3, 7, and others are *not* charged to be infringed,—and he will not squander the attention of the court in discussing their subject-matter.

Knowing that only a single prior use will require a finding of invalidity of a patent in suit,—if such proof be in the record, he will not waste time rolling and unrolling numerous blue prints and handling present day photographs; he will not expect the court to rely upon his unsupported assertions;—he will point briefly, clearly, and distinctly, to *actual proof* of such single use, and will show how it is corroborated so that the court will not have to merely surmise that the subject-matter *may* be old, nor helplessly wonder whether or not it must read the entire record to find out, but will *know to a moral certainty* that the subject-matter is old. If there was a real defense we submit that counsel would have made it clear.

Respectfully submitted,

WESTALL AND WALLACE,
By JOSEPH F. WESTALL.

No. 4585

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAVID PEARLMAN,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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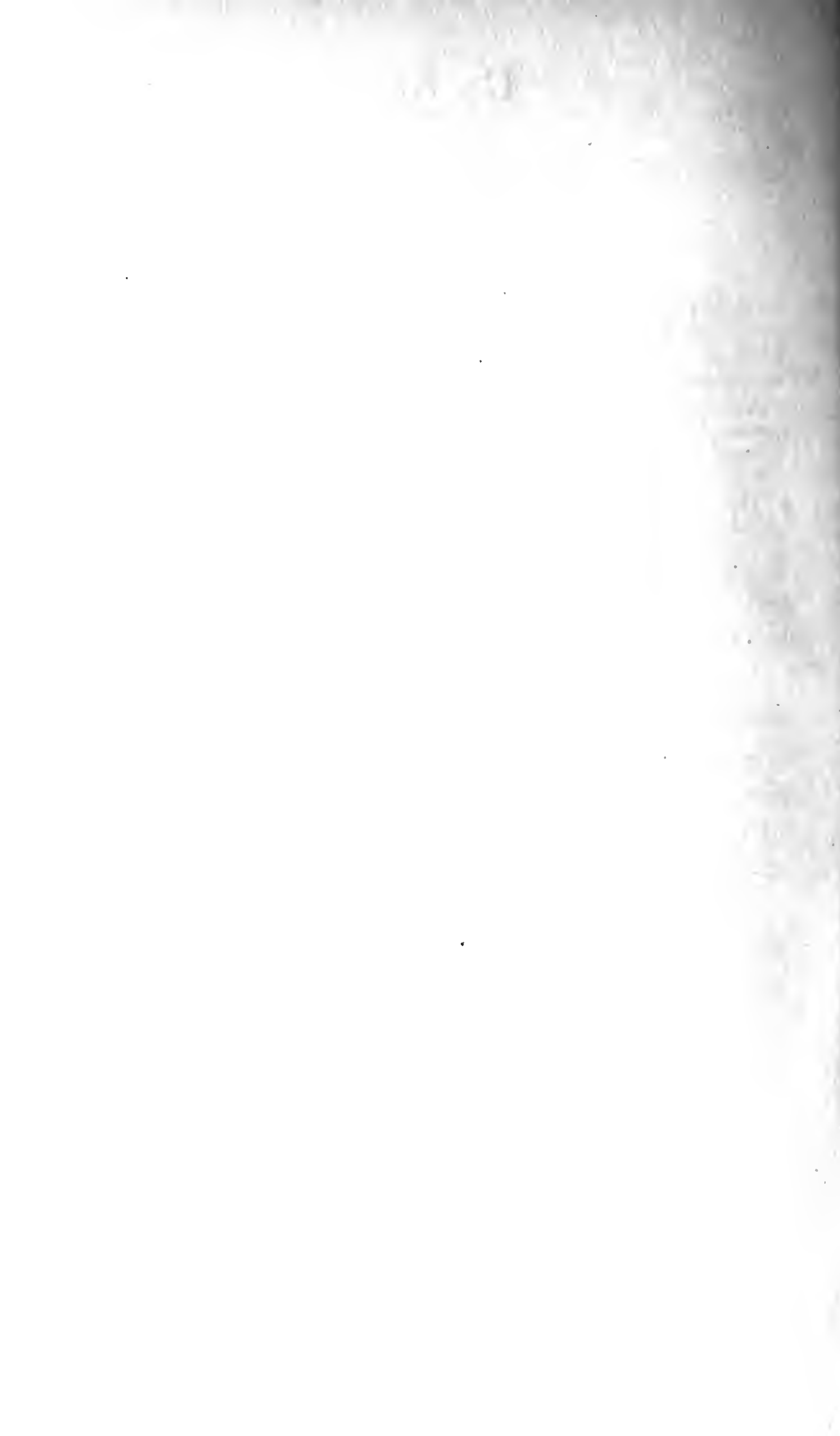

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San Francisco, California.

For Plaintiff and Defendant in Error:
UNITED STATES ATTORNEY,
San Francisco, California.

In the Southern Division of the United States District Court for the Northern District of California.

Clerk's Office.

No. 11,782.

UNITED STATES OF AMERICA

vs.

DAVID PEARLMAN.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of said Court:
Sir:

Please prepare transcript on writ of error as follows:

1. Indictment.
2. Plea.
3. Minutes of the trial.
4. Verdict.
5. Judgment.
6. Motion new trial.

7. Motion in arrest of judgment.
8. Bill of exceptions.
9. Petition for writ of error.
10. Assignment of errors.
11. Order allowing writ of error.

EDWARD A. CUNHA,
Attorney for Defendant.

[Endorsed]: Filed Apr. 22, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

(INDICTMENT.)

At a stated term of said court begun and holden at the city and county of San Francisco, within and for the Southern Division of the Northern District of California on the second Monday of July in the year of our Lord one thousand nine hundred and twenty-two.

The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths present: THAT

DAVID PEARLMAN

hereinafter called the defendant, heretofore, to wit, on or about July 28th, 1922, in violation of section 3 of the National Motor Vehicle Act of October 29th,

*Page-number appearing at foot of page of original certified Transcript of Record.

1919, did unlawfully, wilfully, knowingly and feloniously transport, and cause to be transported in interstate commerce, to wit, from the city of New York, in the State of New York, to San Francisco, in the Southern Division of the Northern District of California and into the jurisdiction of this Court, a certain motor vehicle, to wit, a Cadillac automobile, Motor No. 18664, said defendant then and there well knowing that at the time of said transportation, the said motor vehicle had been stolen.

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,
United States Attorney. [2]

[Endorsed]: A true bill. C. A. Graham, Forman. Presented in Open Court and Ordered Filed Sep. 29, 1922. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [3]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Friday the 10th day of November, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 11,782.

UNITED STATES OF AMERICA,

vs.

DAVID PEARLMAN.

MINUTES OF COURT—NOVEMBER 10, 1922—(ARRAIGNMENT AND PLEA).

In this case the defendant was produced in Court by the U. S. Marshal and with his Attorney, H. Michael, Esq. J. R. Kelly, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. Defendant was duly arraigned upon the indictment filed herein against him, stated his true name to be as contained therein, waived formal reading thereof, and thereupon plead "Not Guilty" of offense charged, which plea the Court ordered entered with leave to defendant to Demur or make such motion as may be desired on or before Nov. 13, 1922. Further ordered case continued to November 25, 1922, to be set for trial; and that defendant, in default of bond as heretofore ordered, stand committed and that mittimus issue.

Page 23, Vol. 58. [4]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 16th day of March, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable A. F. St. SURE, District Judge.

No. 11,782.

UNITED STATES OF AMERICA

vs.

DAVID PEARLMAN.

MINUTES OF COURT—MARCH 16, 1925—TRIAL.

This case came on regularly this day for trial of defendant, David Pearlman, upon indictment filed herein against him. Said defendant was present with Attorney Edw. A. Cunha, Esq. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of United States. Upon calling of case, all parties answering ready for trial, Court ordered same proceed and that the jury-box be filled from regular panel of trial jurors of this court. Accordingly, the hereinafter named persons, having been duly drawn by lot, sworn, examined and accepted,

were duly sworn as jurors to try the issues herein, viz.

Edw. J. Fowler,	R. O. Wilson
H. W. Robinson,	Robt. F. Behlow,
M. Jacobs,	Herbert E. Clayburgh,
T. W. Harron,	Chas. W. Dahl,
H. J. Fleming,	Al. Hanify,
Albert L. Hart,	C. C. Chamberlin,

Mr. Fink made statement to the Court as to the nature of the case and called certain persons as witnesses on behalf of United States, each of whom was duly sworn and examined, to wit: S. J. Adams, M. L. Britt, Henry R. Leong, W. E. Sutton, W. F. Millikan and J. W. Ehrlich, and introduced in evidence on behalf of United States a certain exhibit which was filed and marked U. S. Exhibit No. 1; and rested. [5]

Mr. Cunha thereupon moved Court for order to instruct jury to return verdict of not guilty. After hearing attorneys, ordered motion denied. Case was thereupon rested on behalf of defendant.

Case was then argued by counsel for respective parties and submitted, whereupon the Court proceeded to instruct the jury herein, who, after being so instructed, retired at 2:55 P. M., to deliberate upon a verdict and subsequently returned into Court at 4:10 P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present. Said jury, after being further instructed, again retired at 4:15 P. M., for further deliberations.

Court ordered that should the jury agree upon a verdict before the reconvening of the court to-morrow morning at 10 o'clock, the verdict as agreed upon and signed by the foreman of the jury shall be placed in an envelope and sealed in the presence of the jury and the same shall thereafter be safely kept by the foreman until the reconvening of the Court to-morrow morning, when the foreman shall deliver the sealed verdict to the Court. In the event a verdict is reached, the same shall be kept secret by each member of the jury until such verdict is returned to the Court. And further, in the event that the jury agree upon a verdict and the same is sealed and kept as aforesaid, the individual jurors may separate and go their several ways until the reconvening of the court as aforesaid. Ordered that, in event jury does not agree within a reasonable time, the U. S. Marshal make proper arrangements for their keeping, together with two bailiffs, for the night. Ordered that said U. S. Marshal furnish said jury and two bailiffs with dinner this date and with breakfast on March 17, 1925, all to be at expense of United States.

On motion of Mr. Cunha and after hearing Mr. Fink, further ordered that the order heretofore entered herein [6] (forfeiting bond for appearance of defendant) be and same is hereby vacated, set aside and held for naught and that said bond be and the same is hereby exonerated. Ordered that defendant in default of new bond stand committed and that mittimus issue. [7]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 17th day of March, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable A. F. St. SURE, District Judge.

No. 11,782.

UNITED STATES OF AMERICA

vs.

DAVID PEARLMAN.

MINUTES OF COURT—MARCH 17, 1925—TRIAL (CONTINUED).

In this case the jury returned into court at 10 A. M. and defendant being present in custody of U. S. Marshal and with his Attorney, E. A. Cunha, Esq., and G. J. Fink, Esq., Asst. U. S. Atty., being present for United States, the jury was called and all twelve (12) jurors answered to their names and were found to be present and, in answer to question of the Court, stated they had agreed upon a Verdict and presented a written verdict which the Court ordered filed and recorded, viz.: "We, the Jury, find David Pearlman the defendant at the bar Guilty. Herbert E. Clayburgh, Foreman."

Court ordered jurors discharged from further consideration of this case.

After hearing attorneys, defendant was called for judgment. Defendant was duly informed by the Court of the nature of the indictment filed herein against him, of his arraignment and plea, trial and verdict of jury. Defendant was then asked if he had any legal cause to show why judgment should not be entered and thereupon Mr. Cunha moved Court for order allowing new trial, which motion the Court ordered denied and to which order an exception was entered. Mr. Cunha then [8] made a motion in arrest of judgment, which motion the Court likewise ordered denied and to which order an exception was entered.

On motion of Mr. Cunha, further ordered that exception be entered on behalf of defendant to order denying defendant's motion for order instructing jury to return verdict of not guilty.

Thereupon, no sufficient cause appearing why judgment should not be pronounced, the Court ordered that defendant David Pearlman, for offense of which he stands convicted, be imprisoned for 5 years in U. S. Penitentiary at Leavenworth, Kansas, and that said defendant stand committed to custody of U. S. Marshal for this district to execute said judgment of imprisonment, and that a commitment issue. Ordered that said judgment of imprisonment commence and run from date hereof, provided defendant be not released from custody pending determination of writ of error or appeal herein.

On motion of Mr. Cunha, further ordered that said defendant be not removed from jurisdiction of this Court for period of ten (10) days. [9]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 11,782.

THE UNITED STATES OF AMERICA

vs.

DAVID PEARLMAN.

(VERDICT.)

We, the jury, find David Pearlman, the defendant, at the bar, guilty.

HERBERT E. CLAYBURGH,
Foreman.

[Endorsed]: Filed March 17, 1925, at 10 o'clock A. M. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [10]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 11,782.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID PEARLMAN,
Defendant.

MOTION FOR A NEW TRIAL.

Now comes David Pearlman, defendant in the above-entitled cause and moves the Court to set aside the verdict herein and grant a new trial of said cause, and for reasons therefor shows to the Court the following:

I.

That said verdict in said cause is contrary to law.

II.

That said verdict in said cause is contrary to the evidence.

III.

That the evidence in said cause is insufficient to justify or support said verdict.

IV.

That the Court misdirected the jury in matters of law, and improperly instructed the jury to defendant's prejudice.

V.

That the Court erred upon the trial of said cause in deciding questions of law arising during the course of said trial, which errors were duly excepted to.

Dated and made in open court this 17th day of [11] March, 1925.

EDWARD A. CUNHA,
Attorney for Defendant.

[Endorsed]: Service of copy admitted this 26th day of March, 1925.

GROVE J. FINK,
Asst. U. S. Atty.

Filed Mar. 26, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [12]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 11,782.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID PEARLMAN,

Defendant.

MOTION IN ARREST OF JUDGMENT.

Now comes the above-named defendant and moves the Court that no judgment be rendered on the verdict of guilty returned in the above-entitled cause, and that judgment on said verdict be arrested, and that said verdict be set aside and declared null and void for each of the following causes and reasons:

I.

That the indictment returned and filed herein does not charge or state facts sufficient to constitute a public offense, or any offense against the laws of the United States of America.

II.

That this Court has no jurisdiction to pass judgment upon said defendant by reason of the fact that said indictment on file herein does not state or

charge facts sufficient to constitute a public offense under the laws of the United States of America.

Dated and made in open court the 17th day of March, 1925.

EDWARD A. CUNHA,
Attorney for Defendant. [13]

[Endorsed]: Service of copy admitted this 26th day of March, 1925.

GROVE J. FINK,
Asst. U. S. Atty.

Filed Mar. 26, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 11,782.

Transporting stolen automobile in interstate commerce in violation Sec. 3 Act of Oct. 29, 1919 (Motor Vehicle Theft Act).

THE UNITED STATES OF AMERICA

vs.

DAVID PEARLMAN.

JUDGMENT ON VERDICT OF GUILTY.

Grove J. Fink, Esq., Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by

the Court of the nature of the indictment filed on the 29th day of September, 1922, charging him with the crime of transporting stolen automobile in interstate commerce in violation Sec. 3 Act of Oct. 29, 1919 (Motor Vehicle Theft Act) of his arraignment and plea of not guilty; of his trial and the verdict of the jury on the 17th day of March, 1925, to wit:

"We, the Jury find David Pearlman the defendant at the bar Guilty.

HERBERT E. CLAYBOURGH,
Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment; THAT WHEREAS, the said David Pearlman having been duly convicted in this Court of the crime of transporting stolen automobile in interstate commerce in violation of Sec. 3 Act of Oct. 29, 1919 (Motor Vehicle Theft Act). [15]

IT IS THEREFORE ORDERED AND ADJUDGED that the said David Pearlman be imprisoned for the period of five (5) years in the United States Penitentiary at Leavenworth, Kansas. Term of imprisonment to commence and run from date hereof, providing defendant be not released from custody pending determination of appeal or Writ of Error herein.

Judgment entered this 17th day of March A. D. 1925.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 18, Judg. and Decrees, at page 334. [16]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 11,782.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID PEARLMAN,
Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore and on the 29th day of September, 1922, the grand jurors of the United States of America, within and for the division and district aforesaid, presented and filed in the above-entitled court an indictment against the said defendant, David Pearlman, charging said defendant with the violation, on or about July 28th, 1922, of Section III of the National Motor Vehicle Act of October 29th, 1919; that thereafter and on the 10th day of November, 1922, the said defendant,

appeared in open court, and was arraigned upon said indictment, and upon being called upon to plead to said indictment, pleaded "Not Guilty," as shown by the records herein; and the cause being at issue, the trial of said cause by the order of the Court duly given and made was set for the 16th day of March, 1925, and the said cause came on for trial before said court on Monday the 16th day of March, 1925, before the Honorable A. F. St. Sure, District Judge of said court, the United States being represented by Grove L. Fink, Esq., Assistant United States Attorney-General, and the defendant being represented by Edward A. Cunha, Esq.; and thereupon the jury was selected and impanelled and sworn to try the said cause, and thereupon the plaintiff to maintain the issues on its part to be maintained, introduced and offered in evidence the following testimony, and none other, to wit: [17]

TESTIMONY OF S. J. ADAMS, FOR THE GOVERNMENT.

Testimony of S. J. ADAMS called for the United States, sworn.

Mr. FINK.—Q. Mr. Adams, you now reside in the city of Los Angeles and are engaged in the insurance business, I believe; is that correct?

A. Yes.

Q. In the year 1922 what was your occupation, Mr. Adams?

A. I was a special agent of the Department of Justice.

(Testimony of S. J. Adams.)

Q. Where were you stationed?

A. San Francisco.

Q. Operating from the San Francisco office?

A. Yes.

Q. Did you in that year have occasion to investigate the case of the theft of an automobile by one David Pearlman? A. I did.

Mr. CUNHA.—Just a minute. I will object to that question in that form on the ground it assumes something not in evidence, it calls for a conclusion and opinion of the witness, in that he is asked if he was called upon to investigate the theft of an automobile.

The COURT.—Overruled.

Mr. CUNHA.—It assumes that there was such a thing as the theft of an automobile. That is something that must be proved in this case.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. As of about what date did you start the investigation, Mr. Adams?

A. I believe it was September 7, 1922.

Q. September 7? A. About that.

Q. Did you see the defendant in the course of that investigation, David Pearlman? A. I did.

Q. Where? A. At the city prison.

Q. In San Francisco? A. Yes.

Q. Did you have a conversation with him at that time? A. I did.

Q. Now will you relate to the Court and to the jury as near as you now remember it, Mr. Adams,

(Testimony of S. J. Adams.)

the conversation as it relates to the matter in question?

Mr. CUNHA.—Just a moment, if your Honor please, we object to that question upon the ground that it calls for the conclusion and opinion of the witness, on the further ground that it calls for hearsay testimony, upon the further [18] ground that no foundation for the introduction of the testimony has been laid, and particularly if it is sought by the Government to prove any admissions or confessions of this defendant with regard to acts constituting the *corpus delicti* in this case, that the evidence is immaterial, irrelevant, incompetent and hearsay and there has been no foundation laid for it.

The COURT.—Overruled.

Mr. FINK.—Q. Under the ruling of the Court, you may go ahead.

A. Mr. Pearlman stated, when questioned about the ownership of that car that he had purchased the car in New York.

Mr. CUNHA.—If your Honor please, I overlooked the matter of taking my exception to the last ruling. May I have an exception?

The COURT.—Certainly. That may follow all of your objections.

A. (Continuing.) He was asked how he came into possession of the car and he stated that he purchased it in New York from a second-hand auto market at Third Avenue and Thirteenth Street, I believe, if I recall rightly. I asked him exactly who he bought it from and he said he did not know

(Testimony of S. J. Adams.)

the man's name. He stated also that he went to Albany, New York, and secured this license for the automobile, that is, he left the automobile in New York, took a train to Albany, got the license and went back to New York City and drove the car direct to San Francisco with the exception of a stop-over at Salt Lake, claiming that he stopped at the Newhouse Hotel. However, he had a bill of sale for the car that was issued in Los Angeles. That bill of sale was made out by a man by the name of Lewis, I believe, some second-hand auto market there.

Mr. FINK.—Q. Did you see that bill of sale?

Mr. CUNHA.—Now if your Honor please, keeping in mind that perhaps your Honor will direct the order of proof, I make a motion that the testimony of this witness in which he states that the defendant told him that he had driven the car across the continent, anything with regard to driving the car, be stricken from the record on the ground it is immaterial, irrelevant and incompetent, and an attempt to prove the *corpus delicti* in this case by a confession or a statement of the defendant. I take it, if your Honor [19] please, that you have the discretion as to the order of proof, but to prove the *corpus* of the offense by admissions or statements of the defendant, I think it will be conceded it is beyond the law and is an invasion of the rights of this defendant. That is the point that we make, if your Honor please, that finally in this case the *corpus delicti* must be proved—

(Testimony of S. J. Adams.)

The COURT.—I do not want any argument; just state the point fully.

Mr. CUNHA.—We base our motion to strike out all of the testimony given by the witness on all of the grounds heretofore stated.

The COURT.—Motion denied.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. Did you see that bill of sale?

A. Yes.

Q. Where is that bill of sale at this time?

A. I think the last time that I knew of that bill of sale it was in the hands of Mr. Michelson, Mr. Pearlman's attorney at that time.

Q. Where was that bill of sale dated, if you know? A. It was dated at Los Angeles.

Mr. CUNHA.—As far as that bill of sale is concerned, we object to any testimony along this line on the ground it is immaterial and incompetent, and not the best evidence and not binding upon this defendant.

The COURT.—What about that, Mr. Fink?

Mr. FINK.—I take it that if we cannot produce the bill of sale at this time, and the bill of sale is in the possession of the defendant or his attorney, that we can prove it by such secondary evidence that there is available.

The COURT.—You have shown that it is not available.

Mr. FINK.—I withdraw the question.

Q. Did you ever see the bill of sale after you saw it with the defendant?

(Testimony of S. J. Adams.)

A. I do not think I did, Mr. Fink.

Mr. CUNHA.—He just stated that the attorney, Mr. Michelson, had it when he saw it.

Mr. FINK.—He said he thought that Mr. Michelson had it.

Q. Do you know where that bill of sale is now other than the [20] statement you have just made? A. I do not.

Q. Do you know whether it was Mr. Michels or Mr. Michelson who had the bill of sale?

A. Mr. Michels.

Q. Did he represent this defendant at that time?

A. He did.

Q. What was the date of the purchase, the date that the defendant told you he purchased the car in the city of New York, if you remember?

Mr. CUNHA.—We object to that upon all the grounds heretofore stated, and upon the ground it is immaterial, irrelevant and incompetent, calls for hearsay testimony, on the further ground that no foundation for the evidence has been offered or introduced, upon the further ground that all of this testimony with regard to conversations with the defendant or conduct of the defendant with regard to the bill of sale and otherwise in connection with this automobile is merely an attempt to prove the *corpus delicti* in this case by admissions from the defendant or statements from the defendant either by conduct or by actual verbal statements, and it is incompetent.

The COURT.—Overruled.

(Testimony of S. J. Adams.)

Mr. CUNHA.—Exception.

The COURT.—You have several times quite fully stated your objection. It will save time if it is understood or that it be stipulated that your objection goes to the testimony of this witness concerning the conversation or statements made by the defendant to him, and also with regard to anything having to do with bills of sale or anything else about that machine.

Mr. CUNHA.—And may we have our exception?

The COURT.—I am willing that you should.

Mr. FINK.—Read the question. (Question read by the reporter.)

A. I think it was July 28th, if I am not mistaken.

Q. July what? A. July 28.

Q. Did he tell you what date he arrived here—go ahead with your story.

A. He arrived—

Mr. CUNHA.—Just a moment; we object to the question upon the further ground it is immaterial, irrelevant and incompetent and not the proper method of interrogating the witness at all, to tell the witness to go ahead and tell his story. [21]

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. He said he left New York the latter part of July, about the 30th or 29th, I do not quite remember, he said that he got to San Francisco about September 6th.

Mr. CUNHA.—I make a motion to strike out the last answer on the grounds heretofore urged, and

(Testimony of S. J. Adams.)

on the further ground it is immaterial, irrelevant and incompetent.

The COURT.—Denied.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. Have you narrated all the conversation with the defendant which you now remember, Mr. Adams? A. Particularly, yes.

Q. Do you remember a conversation concerning where he had been in the State of California?

A. No, I do not think so, no.

Q. You do not? A. No.

Q. Now, referring again to the bill of sale to which you testified, I will renew the question that I withdrew, do you now remember where the bill of sale was dated? A. Los Angeles.

Mr. CUNHA.—Just a moment, we object to that on the grounds heretofore stated, and on the further ground it is immaterial, irrelevant and incompetent.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Los Angeles.

Mr. FINK.—Q. Do you remember about the date shown on that bill of sale?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. It was dated, I am pretty sure, the 14th of August.

Mr. FINK.—Q. Do you remember the name of the man who signed it?

Mr. CUNHA.—The same objection.

(Testimony of S. J. Adams.)

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. The heading on the stationery was Lewis, I am positive of that. [22]

A. JUROR.—They were talking about a bill of sale. Does that bill of sale show the substituted new number of the motor?

Mr. CUNHA.—We will make our same objection.

Mr. FINK.—I will cover that in subsequent testimony, if the juror will withdraw it—I will cover it in further testimony from a different witness.

Q. Now, Mr. Adams, do you know anything about the motor number on the machine at all?

Mr. CUNHA.—Just a moment, we will object to that question on the ground it is immaterial, irrelevant and incompetent, and upon the further ground that the use of the expression "the machine" is immaterial and refers to any machine; it does not refer to the particular machine in this case.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. I cannot recall the motor number, from the witness-stand.

Mr. FINK.—Q. Well, by the way, what kind of a car was this?

Mr. CUNHA.—Just a moment, I object to that question on the ground it is immaterial, irrelevant and incompetent, and does not refer to any particular car, and does not designate the automobile referred to in the information or the indictment in

(Testimony of S. J. Adams.)

this case, and on the further ground it is immaterial and incompetent.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. It was a Cadillac limousine.

Mr. FINK.—Q. What model, what year, do you know?

Mr. CUNHA.—The same objection to that.

The COURT.—The same ruling.

Mr. CUNHA.—Exception.

A. 1922, I think it was.

Mr. FINK.—Q. Did you make an examination of the motor of that machine?

A. I did, yes.

Q. Did you see the number 18,664? [23]

The COURT.—I wish to suggest again to counsel if possible to make an objection which may be directed to all of the testimony of this witness so that time may be saved, and the Court will rule upon it and then you can ask your exception to all of the testimony of this witness. Do not you think you have enough to cover it now? I do not want to bind you to anything of that kind, however.

Mr. CUNHA.—I think I understand your Honor's suggestion, and I will try to conform to it.

Mr. FINK.—Q. Did you see the motor number 18,664 upon that motor block?

Mr. CUNHA.—One moment, we object to that on the ground it is immaterial, irrelevant and incompetent, upon all of the other grounds heretofore

(Testimony of S. J. Adams.)

urged, and upon the further ground it is leading and suggestive.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. I cannot recall the number of the motor, but I can recall that there was an alteration on the motor head.

Mr. CUNHA.—I make a motion that the latter part be stricken out on the ground it is a mere volunteer statement of this witness and not responsive to the question.

The COURT.—It may go out.

Mr. FINK.—Q. In your examination of the motor block or wherever the number happened to be did you notice any change or attempt to change the number? A. I did.

Mr. CUNHA.—I object to that as irrelevant and incompetent and upon the further ground that it calls for a mere conclusion and opinion of the witness.

The COURT.—Overruled.

Mr. CUNHA.—Exception. And on the further ground that it is not binding on this defendant.

The COURT.—Overruled.

Mr. FINK.—You may cross-examine.

Mr. CUNHA.—No questions. [24]

TESTIMONY OF M. L. BRITT, FOR THE GOVERNMENT.

Testimony of M. L. BRITT, called for the United States, sworn.

Mr. FINK.—Q. What is your occupation?

A. Special Agent of the Automobile Underwriters, inspector of the State Motor Vehicle Department.

Q. That was your occupation in the year 1922?

A. Yes.

Q. In the year 1922, about the month of August, on or about the sixth of that month did one Henry Leong apply to you for registration or change of registration of a Cadillac limousine?

Mr. CUNHA.—One moment, we object to that upon the ground it is immaterial, irrelevant and incompetent, calls for hearsay testimony, and further on the ground it is not binding on this defendant.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. In the afternoon of September 6, 1922, at 3:40 P. M. Mr. Leong drove a Cadillac suburban car up to the Motor Vehicle Department.

Mr. FINK.—Q. What is a suburban car?

Mr. CUNHA.—Just a moment, Mr. Fink, right there I will make a motion that the answer be stricken out on the ground it is not responsive to the question. The question may be answered yes or *not.*

(Testimony of M. L. Britt.)

Mr. FINK.—It is merely preliminary.

The COURT.—It is preliminary and while it is not absolutely responsive at the same time so that we may save time I will deny the motion.

Mr. CUNHA.—Exception.

A. This Cadillac, which I call a suburban is a Cadillac sedan, it is so registered. I noticed the car across from the Motor Vehicle Department as they drove up, a Cadillac sedan, containing five or six Chinamen at the time.

Mr. CUNHA.—Just a moment. I ask that this witness be questioned and that the examination be conducted in an orderly way by question and answer.

The COURT.—Let the answer go out.

Mr. FINK.—Q. Did Henry Leong apply to you on the date you have named for change in registration or registration in his name for a Cadillac sedan? A. Yes. [25]

Q. Did you make any inspection of that Cadillac sedan?

Mr. CUNHA.—Object to that on the ground it is immaterial, irrelevant and incompetent, not binding on this defendant.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. He presented to me a certificate of registration.

The COURT.—Just a minute. You have heard the question.

Mr. FINK.—Please read the question again.

(Testimony of M. L. Britt.)

(Question repeated by the reporter.) Answer the question? A. Yes.

Q. Did you make an inspection of the motor number? A. I did.

Mr. CUNHA.—I object to that on the ground it is immaterial, irrelevant and incompetent and not binding on this defendant.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. Did you? A. I did.

Q. Did you see upon the motor block or wherever the number appears the number 18,664?

A. Yes.

Mr. CUNHA.—The same objection, and upon the further ground it is leading and suggestive.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. What was the condition, Mr. Britt, of this place where this number appeared?

Mr. CUNHA.—The same objection, and upon the further ground it calls for the mere conclusion, opinion and surmise of this witness.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. It was very rough, and from my observation of engine numbers I knew it not to be a Cadillac engine number.

Mr. CUNHA.—I make the motion that that last statement of the witness be stricken out on the ground it is a mere conclusion and opinion of the witness.

(Testimony of M. L. Britt.)

The COURT.—It will go out. [26]

Mr. FINK.—I will qualify the witness then.

Q. How long have you been in this particular line of business Mr. Britt? A. About ten years.

The COURT.—I think you can ask him that question.

Mr. FINK.—I want to show your Honor that he is a man who has been examining numbers about ten years.

The COURT.—All right.

Mr. FINK.—Q. Have you examined Cadillac cars before in this period of ten years?

A. I have.

Q. Do you know the series of the Cadillac engine numbers?

A. Of that particular year, yes.

Q. Do you know the series of engine numbers of other makes of cars? A. Yes.

Q. Would it have been possible for a 1922 Cadillac sedan to have had the engine number 18,664?

A. No.

Mr. CUNHA.—I object to that on the ground it is immaterial, irrelevant and incompetent, calls for a mere conclusion and opinion of the witness, and furthermore on the ground that no proper foundation has been laid.

The COURT.—On the ground it calls for a conclusion the objection will be sustained.

Mr. FINK.—Q. Did the Cadillac cars have any series of numbers in the year 1922 running in the eighteen thousands?

(Testimony of M. L. Britt.)

Mr. CUNHA.—I object to that question on the ground it is immaterial, irrelevant and incompetent, calls for the mere conclusion and opinion of this witness, and not binding on this defendant, and hearsay.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. No.

Mr. FINK.—Q. Now, what did you do after making this examination, Mr. Britt?

A. I took possession of the Cadillac car.

Q. You took possession of the car. What did you do in the line of notifying other people? [27]

Mr. CUNHA.—Just a moment, I object to that as immaterial, irrelevant and incompetent, and not binding on this defendant, and hearsay.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. I notified detectives Tompkins and Millikin of the San Francisco Auto Detail.

Mr. FINK.—Q. Did you accompany them to Third and Townsend Streets and then to San Jose?

A. Yes.

Q. Was Leong with you? A. Yes.

Q. What did you find, if anything, at Third and Townsend Street depot?

A. At Fourth and Townsend Streets we found the Cadillac car which Mr. Leong owned and had traded to David Pearlman.

Mr. CUNHA.—I make the motion that everything after "we found the Cadillac car" be stricken

(Testimony of M. L. Britt.)

out on the ground that it is a mere conclusion and opinion of this witness and not binding on this defendant.

The COURT.—As to the part "which Mr. Leong owned," that will go out.

Mr. CUNHA.—I don't know as to that.

Mr. CUNHA.—That is also hearsay, will your Honor rule as to both statements?

The COURT.—Let the entire answer go out. Read the question to the witness. (Last question read by the reporter.) Answer that question? It is a simple question. Did you find the car there?

A. We found the car at Fourth and Townsend.

Mr. FINK.—Q. That car was a 1917 Cadillac, was it? A. Yes.

Mr. CUNHA.—The last question is leading.

The COURT.—Yes, but the answer may stand.

Mr. FINK.—Q. What did you do then?

A. We proceeded to the Southern Pacific Depot at Third and Townsend Street.

Q. What did you do? Did you buy any tickets?

A. We ascertained the train time—

Mr. CUNHA.—Just a moment, I object to that on the ground it is immaterial, irrelevant and incompetent and not binding upon this defendant, and hearsay.

The COURT.—Overruled.

Mr. CUNHA.—Exception. [28]

A. We ascertained the time of the trains leaving Third and Townsend for the south.

Mr. FINK.—Q. Did you buy any tickets?

(Testimony of M. L. Britt.)

A. No.

Q. Did you then proceed to go to San Jose?

A. We did.

Q. Now, in what manner?

A. In the Cadillac sedan which I had taken away from Mr. Leong.

Q. Upon arrival in San Jose did you see this defendant?

A. Not at the time of the arrival.

Q. Did you later see him? A. Yes.

Q. About when?

A. About 9:05 P. M. September 6th.

Q. In the evening? A. Yes.

Q. Did you have any conversation with him or were you present when there was any conversation with him, Mr. Britt? A. Yes.

Q. Where was Pearlman when you had this conversation or when you first saw him?

A. He was standing in front of the entrance to the train, in the San Jose depot of the Southern Pacific Railway.

Q. Where did you have this conversation with him?

A. In the police department of the city of San Jose.

Q. Who were present?

A. Detective Millikin, Tompkins, Mr. Leong, Mr. Ehrlich—

Q. Mr. Ehrlich, an attorney at law in San Francisco? A. Yes.

Q. Go ahead. A. Myself and Mr. Pearlman.

(Testimony of M. L. Britt.)

Q. Will you state to the Court *any* jury as near as you remember just the conversation at that time at it relates to this charge here before this Court and jury?

Mr. CUNHA.—We make all the objections heretofore made to the testimony of the conversation as given by the witness Adams, who was first upon the stand and upon the further particular ground that it is immaterial, irrelevant and incompetent, and hearsay, not binding upon this defendant, no foundation has been laid, and an attempt on the part of the prosecution and the Government in this case to prove the facts of this case, the *corpus delicti* by admissions and statements of this defendant. [29]

The COURT.—Overruled.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. Under the ruling *uou* may answer, Mr. Britt. Read the question. (Last question read by the reporter.)

A. Mr. Pearlman was taken to the San Jose Police Department where we searched him. He was found to have in his possession the sum of $600.

Mr. CUNHA.—Just a moment, we make a motion that that statement be stricken out on the ground it is not responsive to the question.

The COURT.—It may go out. Just read the question. (Last question repeated by the reporter.) Go ahead and answer the question.

A. The conversation that we had with Pearlman

(Testimony of M. L. Britt.)

—he was asked what had become of the $2,100 which had been given him by the Chinaman.

Mr. FINK.—Q. What did he say?

A. He said that he had owed a party $1,500 and had forwarded it that day, September 6th; he was in possession of $600 when we searched him.

Q. Did you have any further conversation at that time?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. We asked him about the Cadillac car which was abandoned at Fourth and Townsend Streets, San Francisco, and he stated, he said, "Well, you have me and that is all there is to it."

Mr. FINK.—Q. What if anything did he say—

Mr. CUNHA.—I move the last answer be stricken out on the ground it is immaterial, irrelevant, incompetent, and hearsay, not binding upon the defendant, and upon all the other grounds heretofore urged in my objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. Was there any conversation concerning the car, the Cadillac sedan which was in the possession of Leong when you first saw it?

Mr. CUNHA.—We object to that on all the grounds heretofore urged, and on the further ground it is leading and suggestive. [30]

The COURT.—Overruled.

Mr. CUNHA.—Exception.

(Testimony of M. L. Britt.)

A. He admitted that he had purchased the Cadillac sedan in New York City from in front of Brown's Auction House.

Mr. FINK.—Q. Did he tell you what he paid for it?

A. The sum of $1,000.

Mr. CUNHA.—May we have our objection to all this line of testimony on the grounds heretofore urged, and an exception?

The COURT.—Very well.

Mr. FINK.—Q. What if anything was said by him concerning his method of getting to San Francisco?

A. He stated that he had come out from New York as far as Salt Lake City and had gone from Salt Lake City to Los Angeles via one of the trails, I have forgotten which one it was.

Q. Driving? A. Yes.

Q. Did he say where he stopped in Salt Lake City that you recall?

A. I don't recall that, no.

Q. Now, at the time the trip was made to San Jose what else did you find other than the money?

A. I am a little in doubt as to what was found at the time.

Q. Did you find any papers?

A. There were papers found but what the contents were I don't know.

Mr. FINK.—You may take the witness.

Mr. CUNHA.—No questions.

(Testimony of M. L. Britt.)

Mr. FINK.—Pardon me: Did you return the defendant to San Francisco?

A. Detectives Tompkins and Milliken and myself, yes.

Mr. CUNHA.—We make a motion that all of the testimony of this witness upon all the grounds heretofore urged be stricken out, especially objecting to the admission of statements in evidence of this defendant and conduct of this [31] defendant, and ask that they all be stricken from the record upon all of the grounds heretofore urged.

The COURT.—Motion denied.

Mr. CUNHA.—Exception.

TESTIMONY OF HENRY R. LEONG, FOR THE GOVERNMENT.

Testimony of HENRY R. LEONG, called for the United States, sworn.

Mr. FINK.—Q. Where do you live, Mr. Leong?

A. San Francisco.

Q. California? A. Yes.

Q. What is your business?

A. Automobiles for hire.

Q. Was that your business in 1922? A. Yes.

Q. State whether or not in the year 1922 you were the owner of a 1917 Cadillac car? A. Yes.

Q. Do you know this defendant, David Pearlman? A. Yes.

Q. Did you buy a car from him in 1922, in July or August?

(Testimony of Henry R. Leong.)

Mr. CUNHA.—Just a moment, we make an objection, if your Honor please, to this testimony on all the grounds heretofore urged to the testimony of the witness Adams and the last witness, Mr. Britt, and on the further ground that it calls for the mere opinion, conclusion and surmise of the witness.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. On September 6th.

Mr. FINK.—Q. It was on September 6th?

A. Yes.

Q. Did you buy a car from him upon that day?

A. Yes.

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. What kind of a car?

A. Cadillac suburban.

Q. That is a sedan, is it not, like a sedan?

A. Yes.

Q. What model was it, what year? A. 1922.

Q. What did you give him for that 1922 model of Cadillac?

Mr. CUNHA.—The same objection. [32]

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. $2,100 and my car.

Mr. FINK.—Q. $2,100 and what car?

A. One of the 1917 Cadillacs.

Q. You gave him $2,100 in cash? A. Yes.

(Testimony of Henry R. Leong.)

Q. About what time of day did you make the deal, just approximately?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Around about two o'clock in the afternoon.

Mr. FINK.—Q. What did you do after you had made the deal?

Mr. CUNHA.—I object to that on all the grounds heretofore urged, and on the further ground it is not binding on this defendant.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. I went up to the State Motor Vehicle Department to obtain a license.

Mr. FINK.—Q. Who did you see up there?

A. Mr. Britt.

Q. Did you see the motor number on the car?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Not until I saw Mr. Britt.

Mr. FINK.—Q. Not until you saw Mr. Britt?

A. No.

Q. Did the defendant give you a bill of sale to the car? A. Yes.

Mr. CUNHA.—Just a moment, I make a motion that the answer be stricken out for the purpose of objection.

The COURT.—Overruled.

Mr. CUNHA.—We make the objection upon all

(Testimony of Henry R. Leong.)

of the grounds, heretofore urged, and upon the further ground that this asks for evidence that is not the best evidence. [33]

The COURT.—Overruled.

Mr. CUNHA.—And only calls for the conclusion and opinion of this witness.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. Did the defendant give you a bill of sale to the Cadillac Sedan? A. Yes.

Q. What has become of that, if you know?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. I took it.

Q. You had it in your possession? A. No.

Q. I say you did have it in your possession?

A. Yes, I did.

Q. When did you last see it, how long since you have seen it?

A. I only saw it a little while, and turned it over to my attorney, Mr. Ehrlich.

Q. Did you have any conversation with the defendant before you bought this car?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Yes.

Mr. FINK.—Q. Just tell the Court any jury what he said about this ownership of the car.

(Testimony of Henry R. Leong.)

Mr. CUNHA.—The same objection, and upon the further ground it is leading and suggestive.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. I can't remember all that he told me.

Mr. FINK.—Q. Just do the best you can, as near as you remember it.

Mr. CUNHA.—The same objection, if your Honor please.

The COURT.—Overruled.

Mr. CUNHA.—Exception. [34]

A. I asked him who owned that car, and he told me that he owned it.

Mr. FINK.—Q. Did he tell you where he got it?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. No.

Mr. FINK.—Q. Now, when you saw that motor number up there at the Motor Vehicle Department, did you make any examination of the case where the number was put on?

Mr. CUNHA.—We object to that on the ground it is immaterial, irrelevant and incompetent, and upon all of the ground heretofore urged.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Yes.

Mr. FINK.—Q. Just describe the appearance of the place where the number was, what you saw?

Mr. CUNHA.—The same objection.

(Testimony of Henry R. Leong.)

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. I can't remember now the number.

The COURT.—The appearance of it; just state the appearance of it?

Mr. FINK.—Q. How did it look?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. Just tell us what you saw.

The COURT.—Do you understand the question?

A. Yes. The oil covered up the new number, and I could hardly notice it.

Mr. FINK.—Q. Is that all? A. That is all.

Q. After you had seen Mr. Britt, did you go with him down to the Third and Townsend Streets depot? A. Yes.

Q. Did you find your old 1917 Cadillac car?

Mr. CUNHA.—I object to that on the grounds heretofore urged. [35]

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Yes.

Mr. FINK.—Q. Where?

A. On Fourth and Townsend.

Q. Was there anybody in it? A. No.

Q. Where did you then go?

A. Back up to Eighth Street.

Q. Did you go to San Jose? A. Afterwards.

Q. Did you see this defendant at San Jose?

A. Yes.

(Testimony of Henry R. Leong.)

Q. Where? A. At the Southern Pacific Depot.

Mr. FINK.—That is all. You may cross-examine.

Mr. CUNHA.—No questions.

TESTIMONY OF W. E. SUTTON, FOR THE GOVERNMENT.

Testimony W. E. SUTTON, called for the United States, sworn.

Mr. FINK.—Q. Mr. Sutton, where do you live?

A. Salt Lake City, Utah.

Q. What is your business? A. Hotel.

Q. What hotel? A. Newhouse.

Q. What position do you occupy?

A. Assistant manager.

Q. Have you got the register and the cash-book of the Newhouse Hotel for the 10th and the 12th of August, 1922, with you?

A. I have the register for the date of August 10, 1922, and the cash-book for those days.

Q. This is a page from the register of the Newhouse Hotel? A. Yes.

Q. And that is your cash-book which covers the dates that the guests were there? A. Yes.

Mr. FINK.—I would ask that these be marked for identification, if your Honor please, the register of the Newhouse Hotel for Thursday, August 10, 1922, upon which there appears the registration, "Mr. and Mrs. D. Pearlman, Frisco, Cal."

The WITNESS.—That is on the 12th in the cash-book.

(Testimony of W. E. Sutton.)

Q. The registration is the 10th, and that is correct? A. Yes. [36]

Q. The cash-book shows the date that they stayed? A. Yes.

Q. Can you tell from the cash-book when the parties who registered as indicated checked out?

A. They checked out and paid in advance.

Mr. CUNHA.—We make an objection to all of this line of testimony on the ground it is immaterial, irrelevant and incompetent, and not binding upon the defendant, no foundation laid.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. They checked out on the 12th, paying in advance sometime after eight o'clock the night of the 11th.

TESTIMONY OF WILLIAM F. MILLIKEN, FOR THE GOVERNMENT.

Testimony of WILLIAM F. MILLIKEN, called for the United States, sworn.

Mr. FINK.—Q. Mr. Milliken, what is your occupation?

A. Detective Bureau, Police Department, San Francisco.

Q. San Francisco, California? A. Yes.

Q. Do you know this defendant, David Pearlman? A. I participated in his arrest.

Q. Upon what date? A. September 7, 1922.

Q. Where? A. In San Jose.

Q. Where did you start from?

(Testimony of William F. Milliken.)

A. San Francisco.

Q. How were you conveyed, how did you go down there?

A. We went down in a Cadillac automobile.

Q. A sedan? A. Yes.

Q. Did you inspect the number block on that sedan? A. I did.

Q. Will you describe to the Court and jury what you saw, how that number appeared?

Mr. CUNHA.—I object to the question on the ground it is immaterial, irrelevant and incompetent, not binding upon this defendant, and upon all the [37] other grounds heretofore urged to the testimony of the witnesses Adams, Britt and Leong.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. It was very apparent that the number had been changed. There was no series letter.

Mr. CUNHA.—We make a motion now that the answer be stricken out on the ground it is a mere conclusion and opinion, and surmise of this witness.

The COURT.—Denied.

Mr. FINK.—Q. When you got to San Jose, where did you see the defendant?

A. In front of the depot, the Southern Pacific depot at San Jose.

Q. What did you do? Did yiu place him under arrest at that point?

A. We took him to the police station in San Jose.

Q. Were you present when the defendant was searched, Mr. Milliken? A. I was.

(Testimony of William F. Milliken.)

Q. Will you tell the Court and jury what was found upon him?

A. A sum of money in the neighborhood of $600 and other papers and cards, I do not recall just exactly what they were.

Q. Did you find any railroad transportation upon him?

Mr. CUNHA.—If your Honor please, we would like to object to this line of testimony upon all of the grounds heretofore urged.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. There was a ticket calling for transportation to Los Angeles, and a Pullman berth ticket also in his possession.

Mr. FINK.—Q. Was there a bill of sale among the papers taken off of him? A. I do not recall.

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. Now, Mr. Milliken, were you present at the time a conversation was had at the police station? A. I was. [38]

Q. That was after the arrest of the defendant?

A. Yes.

Q. Will you state as nearly as you now remember just what that conversation was?

Mr. CUNHA.—Now, if your Honor please, we object to this testimony upon all of the grounds heretofore urged to the testimony of a similar character given by the witness Adams and the wit-

(Testimony of William F. Milliken.)

ness Britt, as to statements or conduct on the part of this defendant.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. We asked Mr. Pearlman how he came into possession of this particular Cadillac sedan, referred to in this complaint, and he informed us that he had purchased the car for $1,000 in New York, and had driven it through to Salt Lake City and then to Los Angeles, where he had registered it, and then to San Francisco.

Mr. FINK.—What else?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. I questioned him further in regard to the automobile, if he knew it was stolen, and he would not make much of a further statement, but says: "You have me now, and the automobile now, so there is no use of my making any further signed statement."

Mr. CUNHA.—I move to strike out that last answer on all of the grounds heretofore urged, and upon the ground it is immaterial, irrelevant and incompetent, and hearsay.

The COURT.—Denied.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. Was there anything further said by him in reference to the charge here?

A. There was considerable conversation that per-

(Testimony of William F. Milliken.)

tained to the car; I do not recall anything other than that.

Q. As regards the stay at Salt Lake, did he tell you where he stayed?

A. I did not hear him refer to that. [39]

Q. Did he tell you how he came across the country from New York?

A. He said that he had driven as far as Salt Lake City and then turned south, and then went into Los Angeles.

Q. Driving what?

Mr. CUNHA.—Of course, we have our objection to all of this line of testimony.

The COURT.—Yes.

Mr. CUNHA.—And exception.

The COURT.—Yes.

Mr. GILLIS.—In what?

A. In this particular Cadillac sedan automobile, referred to in this complaint, that he had driven it the entire way.

Mr. CUNHA.—I make a motion that the words, "referred to in this complaint," be stricken out on the ground it could not have been referred to, because it was not filed at that time.

The COURT.—Denied.

Mr. CUNHA.—Exception.

TESTIMONY OF J. W. EHRLICH, FOR THE GOVERNMENT.

Testimony of J. W. EHRLICH, called for the United States, sworn.

Mr. FINK.—Q. Mr. Ehrlich, What is your name?

A. J. W. Ehrlich.

Q. Your profession is that of attorney at law?

A. Yes.

Q. Practicing in the city and county of San Francisco, State of California? A. Yes.

Q. Do you know Henry E. Leong? A. Yes.

Q. Are you his attorney?

A. I was at the time.

Q. You were in 1922? A. Yes.

Q. Do you know this defendant, David Pearlman? A. Yes.

Q. Did you see him on or about September 6th, 1922? A. I did.

Q. In what connection?

A. He called, together with Leong, at my [40] office a day or two previous to that date, and offered to sell—

Mr. CUNHA.—Just a moment. I make an objection to that.

The COURT.—All right. Proceed with the examination.

Mr. FINK.—Q. Upon their arrival at your office, did you have a conversation with this defendant and Mr. Leong? A. I did.

Q. What was the subject matter of that conversation?

(Testimony of J. W. Ehrlich.)

Mr. CUNHA.—I object to that on the ground it is immaterial, irrelevant and incompetent, and upon all of the grounds heretofore urged to the testimony given by the prior witnesses, as to any statements, or admissions, or conduct, or verbal statements of this defendant.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. The defendant offered to sell to Leong in my presence the Suburban type Cadillac that is here in question, and I told Leong, in his presence, that before I would recommend that he buy it, I would have to satisfy myself as to its ownership by going to the Motor Vehicle Department. I went to the Motor Vehicle Department and inquired—

Mr. CUNHA.—I object to that on the ground it is not responsive to the question.

The COURT.—It is overruled, for the purpose of saving time.

Mr. CUNHA.—Exception.

A. I inquired at the Motor Vehicle Department as to the ownership of the suburban type of Cadillac, and they showed me a record—

Mr. CUNHA.—Just a moment, if your Honor please, I object to that on the ground it is hearsay, immaterial, irrelevant and incompetent, not occurring in the presence of this defendant, and not binding upon the defendant, hearsay.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. One of the clerks showed me a record that the

(Testimony of J. W. Ehrlich.)
automobile had been registered in, I believe, Sacramento.

Mr. CUNHA.—Just a moment, we make a motion that that be stricken out.

The COURT.—Now, Counsel, in the beginning of this examination of witnesses [41] I sustained objections that were made by you to permitting witnesses to tell their story to the jury in narrative form, so that you might have the opportunity of making objections when questions were asked and before the answers were made. Now, I thought that would give you an opportunity to interpose what objections you have a right to interpose in protecting the rights of your client. It seems we are going to use up a lot of time if I permit the examination to go ahead in that manner, so I think that, for the purpose of saving time and expediting this trial I will permit the witness to answer the questions that may be propounded by the attorney for the Government in narrative form, and that when the witness has finished his answer you may then interpose such motions and such motions and such objections as you see fit. Now, do not interrupt the witness until he has finished his answer in narrative form.

Mr. CUNHA.—To which ruling of the Court we respectfully take an exception.

The COURT.— you have objected *yo* every statement, but do not interrupt this witness until he is through, and then make all the objections you want to. Now, Mr. *Funk,* frame a question such as you

(Testimony of J. W. Ehrlich.)

think you would like to ask this witness, and we will proceed.

Mr. FINK.—Q. Did you ascertain in whose name the car was registered? A. I did.

Q. You got that, you have already said, from the Motor Vehicle Department? A. Yes.

Q. Whose name was it registered in?

A. David Pearlman.

Q. At that time? A. Yes.

Q. Did you then, have subsequent meeting, there being present Leong and Pearlman and yourself?

A. Yes.

Q. At the subsequent meeting—you stated that the first meeting was two or three days prior to the 6th, I believe; is that correct?

A. Prior to the 6th.

Q. Then when was the next one?

A. It was on the 6th, as I remember it. [42]

Q. What happened at that subsequent meeting?

Mr. CUNHA.—I object to that on the ground it is immaterial, irrelevant and incompetent, and upon all of the grounds heretofore urged.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. I told Mr. Pearlman that I had investigated as far as I could the ownership, and that it was registered in his name, but that I would want a bill of sale to him from the original owner.

Mr. FINK.—Q. Did he produce such a bill of sale?

Mr. CUNHA.—The same objection.

(Testimony of J. W. Ehrlich.)

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. He produced a bill of sale from a man in Los Angeles, whose name, I believe, was Lewis.

Q. Do you remember about the date of that bill of sale?

Mr. CUNHA.—We object to that on the further ground that it does not call for the best evidence.

Mr. FINK.—I will withdraw that last question.

Q. You had in your possession the bill of sale?

A. I did.

Q. How long did you have it, about?

A. Until about two weeks ago.

Q. What became of it, do you know?

A. Well, there was an action upon the arrest of the defendant, he was prosecuted in the Police Court, and at that time I appeared as special prosecutor for the people, and I introduced the bill of sale in evidence at that time.

Q. You have never seen the bill of sale since?

A. No, I have not.

Q. You don't know now where it is?

A. I do not know where it is other than the fact that I introduced it.

Q. Do you remember approximately the date of that bill of sale?

Mr. CUNHA.—We object to that on all of the grounds heretofore urged, and on the further ground it calls for evidence not the best evidence, no foundation laid.

The COURT.—Overruled. [43]

(Testimony of J. W. Ehrlich.)

Mr. CUNHA.—Exception.

A. No, Mr. Fink, I do not exactly remember that date.

Mr. FINK.—Q. Using the date September 6, 1922, the date of the consummation of the transaction, about how far back of it do you think it was?

A. I think it was two or three months.

Q. Now, was the deal for the Cadillac car or Cadillac sedan consummated? A. Yes.

Q. Consummated through you, as the attorney for Leong? A. Yes.

Q. You know the terms of the deal? A. Yes.

Q. Now, did you accompany Mr. Britt, Detective Milliken, and one other detective, and Mr. Leong, to San Jose? A. I did.

Q. Did you see the defendant there? A. I did.

Q. Where?

A. I first saw him at the Southern Pacific depot.

Q. And later where?

A. In the police station in the city of San Jose.

Mr. FINK.—I desire at this time to introduce in evidence in this case a record of this court, the bond of this defendant in this case, the purpose being to compare the signature thereupon with Government's Exhibit 1 for Identification.

Mr. CUNHA.—To which we object on the ground it is immaterial, irrelevant and incompetent, not binding upon this defendant, no proper foundation having been laid.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

The COURT.—You are offering it in evidence now, Mr. Fink?

Mr. FINK.—Yes.

The COURT.—It may be marked.

Mr. FINK.—It is already of record, and it need not be filed again.

Mr. CUNHA.—If your Honor please, at this time I move— [44]

The COURT.—I did not make myself clear. My purpose in making the statement I did to you, saying that hereafter I would permit witnesses to give their testimony in narrative form, so that it would prevent this long stringing out of objections, coming long after each question and answer, and that I would give you an opportunity to make an objection if you felt so disposed to the narrative of the witness, Mr. Fink did not see fit to follow that line.

Mr. CUNHA.—This witness gave some testimony as to the records of the Motor Vehicle Department, and we make a motion that it be stricken out on the ground it is hearsay, and not the best evidence, and immaterial, irrelevant and incompetent, and not binding upon this defendant.

The COURT.—Denied. I do not now recollect what the records were, but if they are necessary to be produced I assume the Government will produce them here at the proper time.

To which ruling the defendant excepted.

TESTIMONY OF S. J. ADAMS, FOR THE GOVERNMENT (RECALLED).

Testimony of S. J. ADAMS, recalled for the United States.

Mr. FINK.—Q. Mr. Adams, in the matter of any conversation with this defendant, have you related all of the conversation that you remember with reference to the car, the Cadillac sedan?

A. I cannot exactly recall anything else, unless it is general conversation.

Q. Do you recall a conversation with this defendant, in which the defendant told you what he knew about how he got the car?

Mr. CUNHA.—I object to that upon all of the grounds heretofore urged as to admissions and statements of this defendant, and upon the further ground it is leading and suggestive.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Do you refer to a conversation as to where he claimed he bought the car.

Mr. FINK.—Yes. You have already testified to that? A. Yes.

Q. Did you have a later conversation in which he stated what he found out about the car?

A. Yes, he said he did not know it was a stolen car until a few days after he left New York. [45]

Q. What did he say about his knowledge at that time?

Mr. CUNHA.—The same objection.

(Testimony of S. J. Adams.)

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Well, I cannot exactly say.

Mr. FINK.—Q. Did he say to you, or did he not say to you that he knew it was a stolen car?

A. Yes.

Mr. CUNHA.—Just a moment, I object to that on all of the grounds heretofore urged, and on the ground it calls for the mere conclusion and opinion of the witness, and not binding upon this defendant, no foundation laid, hearsay and on the further ground it is leading and suggestive.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. As I said before, he said that he did not know it was a stolen car until he left New York.

Mr. FINK.—Now, if your Honor please, I ask for the introduction in evidence of the register of the Newhouse Hotel of August 10. It is now marked for identification, the Court will recall.

The COURT.—It may be admitted.

Mr. CUNHA.—We would like to object to its introduction.

The COURT.—All right, object.

Mr. CUNHA.—Upon the ground it is immaterial, irrelevant and incompetent, hearsay, upon the further ground that no foundation has been laid, upon the ground that it is an attempt on the part of the Government to prove the *corpus delicti* in this case by statements and admissions, and admissions by conduct on the part of this defendant.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

(The register was marked U. S. Exhibit 1.)

Mr. FINK.—I desire to exhibit to the jury the registration upon this page at the point marked with a cross, and signature "David Pearlman" upon the other [46] document. The sole purpose of this document, Gentlemen, is to compare the signature "David Pearlman."

TESTIMONY OF M. L. BRITT, FOR THE GOVERNMENT (RECALLED).

Testimony of M. L. BRITT, recalled for the United States.

Mr. FINK.—Q. Mr. Britt, were you able to read the true number of that automobile, that Cadillac sedan?

Mr. CUNHA.—Just a moment, I object to that on the ground it is immaterial, irrelevant and incompetent, calls for the opinion and conclusion of the witness, on the further ground it is hearsay and not the best evidence, not binding on this defendant.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. The correct motor number—

Mr. CUNHA.—Just answer "Yes" or "no," first.

A. No.

Q. Were you able to ascertain the true number by any examination?

(Testimony of M. L. Britt.)

Mr. CUNHA.—The same objection, as to the last question.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. The car was identified through a secret unit number—

Mr. CUNHA.—We object to that.

The COURT.—Strike out the answer. Read the question.

(Last question repeated by the reporter.)

A. No.

Mr. FINK.—Q. Mr. Britt, you testified that you had been in this business and have been examining automobiles for a period of about ten years or thereabouts? A. Yes. [47]

Q. Is there any distinctive mark on a Cadillac which is distinguished from the motor number?

Mr. CUNHA.—Just a moment. I object to that on the ground it is immaterial, irrelevant and incompetent, calls for the conclusion and opinion of this witness, hearsay, and not the best evidence.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Yes, they use a prefix in the different years models.

Mr. FINK.—Q. Where does that appear?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. It appears upon the motor base at the right rear, and upon a plate upon the dashboard.

(Testimony of M. L. Britt.)

Mr. FINK.—Q. What is this called by the company?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. What do you know this number as?

A. It would be known as the correct motor number.

Q. Were you able to identify the other number?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Not from the motor number, no.

Mr. FINK.—Q. By its use you are able to determine the other number, are you not?

Mr. CUNHA.—Same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. If I could explain it I would tell you the workings of it.

Q. What unit number—do you call it a unit number? A. Yes. [48]

Q. What unit number did you find upon this block?

Mr. CUNHA.—The same objection.

The COURT.—The same ruling.

Mr. CUNHA.—Exception.

A. The secret unit number appears on all automobiles, which gives the entire history of all the cars, and the automobile record—

(Testimony of M. L. Britt.)

Mr. CUNHA.—I object to the answer as not responsive to the question, and ask that the word "secret" be stricken out as a mere conclusion and opinion of this witness.

The COURT.—Denied.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. Was the true number of that automobile, that true motor number at this point?

Mr. CUNHA.—I object to that on the ground it is immaterial, irrelevant, and incompetent, calls for the mere conclusion and opinion of the witness, and hearsay.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Through the secret number it was identified, yes.

Mr. CUNHA.—I make the motion that that be stricken out on the ground it is not responsive to the question.

The COURT.—Denied.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. What was that unit number?

Mr. CUNHA.—The same Objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. I could not give the unit number at this time—the proper motor number, that is all.

Mr. FINK.—Q. Do you know the proper motor number or the correct motor number that you ascertained in the manner you have described?

A. Yes.

(Testimony of M. L. Britt.)

Mr. CUNHA.—I object to that on the ground it is immaterial, irrelevant [49] and incompetent, not the best evidence, calls for the mere opinion and conclusion of this witness, and hearsay.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

Mr. FINK.—Q. What it it?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. 61 A 130.

Mr. CUNHA.—If your Honor please, we want to present an argument and motion, and the Government's entire case should be in before the motion is made. Mr. Davis was here just before noon. [50]

The COURT.—Proceed with your motion.

Mr. CUNHA.—If your Honor please, at this time I make a motion now that all of the testimony of the witnesses for the Government, and particularly the testimony of the witness for the Government, concerning admissions and statements by the defendant, and conduct on the part of the defendant, that all that testimony be stricken out, upon the ground that no proper foundation has been laid for the testimony, on the ground that there is nothing connected up, and the further ground it is immaterial, irrelevant and incompetent, hearsay, and not binding upon the defendant, upon the ground that it has been merely an attempt to prove the *corpus* of this offense, the *corpus delicti* by admissions, statements of the

defendant and by conduct on the part of the defendant, which must come in under the head of admissions; I make a motion that all of that testimony be stricken out on all of the grounds heretofore stated, and upon all the grounds urged at the time the testimony was objected to.

The COURT.—Denied.

Mr. CUNHA.—To which ruling the defendant by his counsel then and there duly excepted.

Mr. CUNHA.—Now, if your Honor please, I at this time make a motion that your Honor advise and instruct this jury to return a verdict in favor of the defendant, a verdict of acquittal, upon the ground that the evidence presented by the prosecution is insufficient to support and prove any allegation of the indictment; the evidence is insufficient to establish and prove any offense in this case as set forth in the indictment. I do not believe, if your Honor please, that it is necessary for me to argue it at any great length, the fact that the corpus delicti in a case must be proved by evidence apart from a conversation, or admissions, or statements of the defendant. (After argument.)

The COURT.—The motion is denied.

To which ruling the defendant by his counsel then and there in open court, duly excepted. [51]

Thereupon both parties announced they had no more evidence to present and the evidence was closed. The cause was argued by counsel for the respective parties to the jury, and thereupon the court instructed the jury as follows:

CHARGE TO THE JURY.

The COURT.—(Orally.) Gentlemen of the Jury: The offense charged against the defendant, David Pearlman, is that on or about the 26th of July, 1922, in violation of the National Motor Vehicle Act of October 29, 1919, he did unlawfully, wilfully, knowingly and feloniously transport and cause to be transported in interstate commerce, to wit: from the city of New York, in the State of New York, to San Francisco, and into the jurisdiction of this court, a certain motor vehicle, to wit: a Cadillac automobile, motor number 18,664, said defendant then and there well knowing that at the time of the said transportation the said motor vehicle had been stolen.

The indictment on file herein is, and is to be considered as a mere charge or accusation against the defendant, and is not, of itself, any evidence of the defendant's guilt, and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

I charge you that the term "interstate commerce," as used in the Act of Congress mentioned, includes transportation from one State to another. I charge you further, under the facts in this case, that, if you find Pearlman took this vehicle, and by driving it, moving it through the use of its own power, caused himself to be transported by this vehicle from New York State to California, for any purpose whatsoever, that that would be a transportation in interstate commerce, as intended by that statute. [52]

I charge you as a matter of law that it is for you to say whether, under all of the circumstances, all of the testimony in the case, it indicates to your mind, to the exclusion of any other reasonable inference, that there was guilty knowledge on the defendant's part, that he knew the car must have been stolen. If you come to the conclusion beyond a reasonable doubt that he knew it was stolen, you should find him guilty; otherwise, not guilty.

The jury are the exclusive judges of the facts. The province of the court and the province of the jury is entirely separate and distinct. You are to receive the law from the court and you are bound to accept the law as given you by the court. The facts of the case are to be decided by you.

You are the exclusive judges of the weight, value and effect of the evidence, and of the credibility of the witnesses. Under your oaths as jurors, you are to take into consideration only such evidence as has been admitted by the court, and you should, in obedience to your oath, disregard and discard from your minds every impression or idea suggested by questions asked by counsel which were objected to and to which objections were sustained.

In criminal cases, guilt must be established beyond a reasonable doubt, and the burden of establishing such guilt rests upon the Government. The law does not require of the defendant that he prove himself innocent, but the law requires the Government to prove the defendant guilty, in the manner and form as charged in the

indictment, beyond a reasonable doubt, and unless the Government has done so, the jury should acquit. Before a verdict of guilty can be rendered, each member of the jury must be able to say, in answer to his individual conscience, that he has in his mind arrived at a fixed opinion, based upon the law and the evidence of the case, and nothing else, that the defendant is guilty.

If the evidence relating to any circumstance in this case is, in view of all of the evidence, reasonably susceptible of two interpretations, one of which would point to the defendant's guilt and the other of which would admit of his innocence, then it is your duty in considering such evidence to adopt that interpretation which will admit of the defendant's innocence if the same may be done reasonably. [53]

The defendant did not take the witness-stand, or offer himself as a witness in this case. This is his right. He is entitled to stand upon the insufficiency of the evidence offered by the Government, if there be insufficiency in that evidence. And, in consequence, his failure to testify cannot be commented upon or used against him, and may not be the basis of any presumption against him.

The law presumes a defendant charged with crime innocent until proven guilty beyond a reasonable doubt. This presumption remains with the defendant, and will avail to acquit him unless overcome by proof of his guilt beyond a reasonable doubt. If you can reconcile the evidence before

you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find such defendant not guilty.

A reasonable doubt is a doubt resting upon the judgment and reason of men who conscientiously entertain it from the evidence in the case. It is a doubt based upon reason. By such a doubt is not meant every possible or fanciful conjecture that may be suggested or imagined. A reasonable doubt is that stage of the case which after the entire comparison and consideration of all of the evidence in the case leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

The Court cautions you to distinguish carefully between the evidence given by the witnesses and the statements made by counsel or contained in their argument, as to what facts have been proven. And if there is a variance between the two, you must, in arriving at your verdict, to the extent that there may be such variance, consider only the facts testified to by the witnesses.

When, weighing all the evidence, you have an abiding conviction and belief that the defendant is guilty, it it your duty to convict, and no sympathy justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of law or facts.

Your verdict must be unanimous.

When you are alone in the jury-room, you may select one of your number as foreman, and when

you have agreed upon a verdict your foreman [54] *your foreman* will sign the verdict and you will be returned to the courtroom, where you will deliver your verdict. You may now retire for deliberation.

(Thereupon the jury retired, and at 4:10 o'clock P. M., the jury was brought into court, when the following proceedings were had):

The COURT.—Gentlemen: The officer in charge of you has indicated to me that you wish to ask a question.

The FOREMAN.—Yes, your Honor, we do desire to ask you a question about whether or not the defendant should have had knowledge that this was a stolen car.

The COURT.—The language of the indictment, Gentlemen, is quite plain. The indictment charges that David Pearlman, on or about July 28, 1922, in violation of Section 3 of the National Motor Vehicle Act of October 29, 1919, did unlawfully, wilfully, knowingly and feloniously transport and cause to be transported in interstate commerce, to wit, from the city of New York, in the State of New York, to San Francisco, in the State of California, a certain motor vehicle, to wit: a Cadillac automobile, motor No. 18,664, said defendant then and there well knowing that, at the time of said transportation, said motor vehicle had been stolen.

Now, the charge in the indictment is based upon the provisions of the statute. The indictment contains the same language that the statute con-

tains, that is to say, the same language with reference to trnsportation and with reference to knowledge. My recollection of the provisions of the statute is that it must be with guilty knowledge, that is to say, the transportation must take place, or must be made by the defendant, the defendant then and there well knowing that at the time of the transportation the motor vehicle had been stolen.

The clerk has handed me the Federal Code, and, referring to that, I find that the language is: "Knowing the same to have been stolen." Those words are in the statute, "knowing the same to have been stolen."

Does that answer your question?

The FOREMAN.—I think it answers it partly. Must he have had knowledge on the date of July 28th?

The COURT.—On or about that date. My view of that would be that if [55] an offense were committed it might be said to be a continuing offense, that is to say, that he might or might not have known that the automobile had been stolen when he left the State of New York. I take it that if he thereafter had learned that the automobile had been stolen after he left the State of New York, and he continued on his way across the country through other States and came to California, I should say that, if you find that that was the evidence, that that would be sufficient to sustain a conviction. Is that clear?

Mr. CUNHA.—On behalf of the defendant, if

your Honor please, we except to the instruction just given by the Court.

The COURT.—Does that make it clear?

The FOREMAN.—Yes, your Honor.

The COURT.—Now, you will remember that I charged you, and I will repeat it to you in this connection: I charge you as a matter of law that it is for you to say whether, under all of the circumstances, all of the testimony in the case, it indicates to your mind, to the exclusion of any other reasonable inference, that there was guilty knowledge on defendant's part, that he knew the car must have been stolen. If you come to that conclusion beyond a reasonable doubt, that he knew it was stolen, you should find him guilty, otherwise not guilty. You may return to the jury-room for further deliberation.

Another JUROR.—Your Honor, on the admissibility of the defendant's own testimony?

The COURT.—What about it?

The JUROR.—Whether that can be taken against him.

The COURT.—I read you an instruction, Mr. Juror, to the effect, calling your attention to the fact, that the defendant had not seen fit to take the stand. Now, he does not have to take the stand, and the fact that he does not take the stand you must not hold against him in any way.

The JUROR.—That is the point I wanted.

The COURT.—He is presumed to be guilty, and the Government must prove him guilty. The fact that he has not taken the stand you must not take

against him. I should have said he is presumed to be innocent. [56]

A JUROR.—The fact that he does not take the stand does not prove him guilty?

The COURT.—No, the fact that he does not take the stand does not prove him guilty?

Another JUROR.—Your Honor, I would like to ask this question, which came up in the jury-room, with reference to the evidence that was submitted here this morning by men who said things that the defendant had said at the time of the arrest. Some of the jurors felt that such testimony was not to be considered at all, because it was the defendant that had made such admissions.

The COURT.—A man may make admissions, and those admissions may be against his own interests. The law permits reception of such evidence. Now, it is for you to determine from that evidence whether or not the defendant is guilty. That evidence was properly admitted, and you are to weigh that the same as you would any other evidence that was introduced before you. It is not for you to question the propriety of the admission of such evidence. When the Court admits the evidence, then you are to consider that evidence in conjunction with all of the other evidence that has been admitted in the case. You must not argue amongst yourselves whether or not the Court is right in admitting certain evidence. That is not your province at all. Your province is simply to weigh the evidence before you and arrive at a verdict.

Now, then, Gentlemen, I am going to return you to the jury-room, and I am going to ask you to deliberate upon the case further. It may be that I will not be here when you have arrived at a verdict, so I am going to make an order in the premises:

The Court orders that should the jury agree upon a verdict before the reconvening of the court to-morrow morning at ten o'clock the verdict, as agreed upon and signed by the foreman of the jury shall be placed in an envelope and sealed in the presence of the jury and the same shall thereafter be safely kept by the foreman until the reconvening of the court to-morrow morning, when the foreman shall deliver the sealed verdict to the Court. In the event a verdict is reached, the same shall be kept secret by each member of the jury until such verdict is returned to the Court. And further, in the [57] event that the jury agree upon a verdict and the same is sealed and kept as aforesaid, the individual jurors may separate and go their several ways until the reconvening of court as aforesaid.

Now, then, Gentlemen, in the event you do not agree within a reasonable time, arrangements will be made whereby you may be put up for the night in a suitable hotel and kept there under the custody of the officers of the court, until you are returned here to-morrow morning. Now, do you understand what I have said to you with reference to the sealed verdict?

The FOREMAN.—Yes, your Honor.

The COURT.—You may retire.

Thereupon the jury retired to deliberate, and returned into court at 10 A. M. on March 17th, 1925, and announced that they had agreed upon a verdict, and that their verdict was that they found the defendant guilty as charged in the indictment; to which verdict said defendant then and there duly excepted.

The defendant was thereupon arraigned for judgment and said defendant then and there moved for a new trial upon all of the statutory grounds, and the Court announced that said defendant was granted the right to thereafter file a written motion for a new trial in conformity with said motion so made in open court.

Thereupon said motion for a new trial as made and thereafter to be filed was by the Court, by its order duly given and made, denied to which ruling the defendant, then and there excepted.

Thereupon said defendant moved in arrest of judgment and applied for an order that no judgment be entered upon the said verdict against him, said motion and application being made upon all the statutory grounds, and the Court announced that said defendant was granted the right to thereafter file said motion so made in open court. [58]

Thereupon said motion in arrest of judgment as made and thereafter to be filed, was by an order of said Court, duly given and made, then and there denied, to which ruling and order said defendant then and there duly excepted.

Thereupon said Court pronounced judgment and sentence as follows:

Said defendant was sentenced to imprisonment for five years in the United States Penitentiary at Leavenworth, Kansas.

That said defendant hereby presents the foregoing as his bill of exceptions herein, and respectfully requests that the same be allowed, signed and sealed and made a part of the record in this case.

Dated, March 26th, 1925.

DAVID PEARLMAN,
Defendant.

EDWARD A. CUNHA,
Attorney for Defendant [59]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 11,782.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID PEARLMAN,
Defendant.

NOTICE OF PRESENTATION OF PROPOSED BILL OF EXCEPTIONS.

To Sterling Carr, United States Attorney, and Grove L. Fink, Assistant United States Attorney:

You will please take notice that the foregoing constitutes and is the proposed bill of exceptions of the defendant in the above-entitled cause, and the

said defendant will apply to the said Court to allow said bill of exceptions and to sign and seal the same as the bill of exceptions herein.

Dated: March 26, 1925.

EDWARD A. CUNHA,
Attorney for Defendant. [60]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 11,782.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID PEARLMAN,
Defendant.

STIPULATION RE BILL OF EXCEPTIONS.

It is hereby stipulated and agreed that the foregoing bill of exceptions is correct and contains all the pertinent evidence adduced at the trial of said cause, and all other proceedings herein, and that the same may be signed, settled, allowed and sealed by the Court.

Dated April 2, 1925.

STERLING CARR,
United States Attorney.
GROVE J. FINK,
Asst. U. S. Atty.
EDWARD A. CUNHA,
Attorney for Defendant. [61]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 11,782.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID PEARLMAN,

Defendant.

ORDER SETTLING BILL OF EXCEPTIONS.

This bill of exceptions having been duly presented to the Court within the time allowed by law and the rules of the Court and within the time extended by the Court by orders duly and regularly made, contains all the evidence and other proceedings in said cause and is now signed, sealed and made a part of the records in this case, and is allowed as correct, and its accuracy is hereby attested:

Dated April 2, 1925.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Apr. 2, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [62]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 11,782.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID PEARLMAN,

Defendant.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS.

Now comes David Pearlman, defendant herein, by Edward A. Cunha, Esq., his attorney, and says that on the 17th day of March, 1925, this Court rendered judgment herein against the defendant in which judgment and the proceedings had prior thereto in this cause, certain errors were permitted to the prejudice of the defendant all of which errors will more fully appear from the assignment of errors which is filed with this petition.

WHEREFORE, the defendant prays that writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and that a transcript of the record in this cause, duly authenticated, may be sent to the Circuit Court of Appeals, aforesaid, and that this defendant be awarded a *supersedeas* upon said judgment and all necessary and proper process including bail.

Dated April 22, 1925.

EDWARD A. CUNHA,
Attorney for Defendant. [63]

[Endorsed]: Rec. a copy Apr. 22, 1925.

STERLING CARR,
U. S. Atty.

Filed Apr. 22, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [64]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 11,782.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID PEARLMAN,
Defendant.

ASSIGNMENT OF ERRORS.

David Pearlman, defendant in the above-entitled cause and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a writ of error to this court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence entered in said cause against said David Pearlman, now makes and files with his said petition the following assignment of errors herein upon

which he will rely in the prosecution of his writ of error in said cause, and upon which he will apply for a reversal of said judgment and sentence upon the said writ, and which said errors and each of them, are to the great detriment, injury and prejudice of said defendant, and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof in the District Court of the United States for the Northern District of California, there is manifest error in this to wit:

1. The Court erred in not instructing the jury to [65] acquit said defendant at the conclusion of the presentation of the case for the Government and of all of the evidence for the Government against said defendant. The evidence was insufficient to establish the allegations of the indictment or to convict said defendant and plaintiff in error, particularly in that it was not proven or established that the automobile in question and referred to in the indictment was stolen, and for the further reason that it was not proven or established that the said automobile was transported or driven or taken any place, or from state to state by said defendant. There was no proof that the automobile named in the indictment ever had an owner, or that anyone other than said defendant was the owner of said automobile, or that the owner if any, of said automobile did not consent to the taking of the same by said defendant; there was no proof of a larceny or the stealing of said automobile by anyone; the

only evidence covering the matters referred to in this paragraph consisted of alleged statements by the defendant and this evidence was incompetent and hearsay, because it was an attempt on the part of the Government to establish the *corpus delicti* of the offense alone by the admissions and statements of the defendant, when no other evidence had been introduced or was later introduced to establish the *corpus delicti.* The defendant and plaintiff in error raised the various questions herein pointed out by appropriate and timely exceptions to the introduction of the evidence of the Government and by appropriate and timely motions to strike out the evidence of the Government and by a motion for a directed verdict of not guilty, which said motion for a directed verdict was made at the conclusion of the Government's case, and to the Court's orders overruling defendant's [66] objections to the introduction of said testimony and denying said motions defendant and plaintiff in error duly excepted.

2. The Court erred in overruling and denying the motion for a new trial made by said defendant.

3. The Court erred in overruling and denying the motion in arrest of judgment made by said defendant.

4. The Court erred in denying the motion of said defendant to strike out certain testimony of the witnesses for the Government, which said motion was made at the conclusion of the case of the Government upon said trial.

5. The Court erred in permitting the witness S. J. Adams to testify, over the objection and exception of the defendant to certain statements made by the defendant, the question being as follows:

> "Q. Now will you relate to the court and to the jury as near as you now remember it, Mr. Adams, the conversation as it relates to the matter in question?"

6. The Court erred in denying defendant's motion to strike out certain testimony of said witness, Adams, which said motion and the exception to the ruling of the Court is as follows:

"Mr. CUNHA.—Now if your Honor please, keeping in mind that perhaps your Honor will direct the order of proof, I make a motion that *that* the testimony of this witness in which he states that the defendant told him that he had driven the car across the continent, anything with regard to driving the car, be stricken from the record on the ground it is immaterial, irrelevant and incompetent, and an attempt to prove the *corpus delicti* in this case by a confession or a statement of the defendant. I take it, if your Honor please, that you have the discretion as to the order of proof, but to [67] prove the *corpus* of the offense by admissions or statements of the defendant, I think it will be conceded it is beyond the law and is an invasion of the rights of this defendant. That is the point that we make, if your Honor please, that finally in this case the *corpus delicti* must be proved—

The COURT.—I do not want any argument; just state the point fully.

Mr. CUNHA.—We base our motion to strike out all of the testimony given by the witness on all of the grounds heretofore stated.

The COURT.—Motion denied.

Mr. CUNHA.—Exception."

7. The Court erred in permitting the said witness, Adams, to testify, over the objection and exception of the defendant, to certain statements made by the defendant, the question being as follows:

Q. What was the date of the purchase, the date that the defendant told you he purchased the car in the city of New York, if you remember?

Mr. CUNHA.—We object to that upon all the grounds heretofore stated, and upon the ground it is immaterial, irrelevant, and incompetent, calls for hearsay testimony, on the further ground that no foundation for the evidence has been offered or introduced, upon the further ground that all of this testimony with regard to conversations with the defendant or conduct of the defendant with regard to the bill of sale and otherwise in connection with this automobile is merely an attempt to prove the *corpus delicti* in this case by admissions from the defendant or statements from the defendant either by conduct or by actual verbal statements, and it is incompetent. [68]

The COURT.—Overruled.

Mr. CUNHA.—Exception.

The COURT.—You have several times quite fully stated your objection. It will save time if it is understood or that it be stipulated that your objection goes to the testimony of this witness concerning

the conversation or statements made by the defendant to him, and also with regard to anything having to do with bills of sale or anything else about that machine.

Mr. CUNHA.—And may we have our exception?

The COURT.—I am willing that you should.

8. The Court erred in allowing said witness, Adams, to testify, over the objection and exception of the defendant, to certain statements of the defendant, the question being as follows:

"Q. Did he tell you what date he arrived here—go ahead with your story?"

9. The Court erred in permitting the witness, Adams, over the objection and exception of the defendant, to testify to the contents of a certain bill of sale, the objection of the defendant being based upon the ground, among others, that the evidence introduced was not the best evidence, some of the said questions being as follows:

"Q. Now referring again to the bill of sale to which you testified I will renew the question that I withdrew, do you now remember where the bill of sale was dated?"

"Q. Do you remember about the date shown on that bill of sale?"

"Q. Do you remember the name of the man who signed it?" [69]

The Government laid no foundation for the introduction of secondary evidence in this connection.

10. The Court erred in permitting said witness, Adams, to testify, over the objection and exception of the defendant, to certain matters concerning the

number of the automobile in question, the said question being as follows:

"Q. In your examination of the motor block or wherever the number happens to be, did you notice any change or attempt to change the number?"

11. The Court erred in permitting the witness, M. L. Britt, to testify, over the objection and exception of the defendant, to certain statements made by the defendant, the questions being as follows:

"Q. Will you state to the Court and jury as near as you remember just the conversation at that time as it relates to this change here before this Court and jury?"

"Q. What did he say?"

"Q. Was there any conversation concerning the car, the Cadillac Sedan which was in the *possession Leong* when you first saw it?"

"Q. Did he tell you what he paid for it?"

12. The Court erred in permitting the said witness, Britt, to testify, over the objection and exception of the defendant, to certain statements made by the defendant concerning his movements, the said question being as follows:

"Q. What if anything was said by him concerning his method of going to San Francisco?"

This was clearly an attempt on the part of the [70] Government to prove the *corpus delicti* by the statements of the defendant, unsupported by any other testimony.

13. The Court erred in denying the motion of the defendant, to strike out the testimony of the said witness, Britt, which said motion was made at

the conclusion of the testimony of said witness, the said motion and ruling being as follows:

"Mr. CUNHA.—We make a motion that all of the testimony of this witness upon all the grounds heretofore urged be stricken out, especially objecting to the admission of statements in evidence of this defendant and conduct of this defendant, and ask that they all be stricken from the record upon all the grounds heretofore urged.

The COURT.—Motion *died.*

Mr. CUNHA.—Exception."

14. The Court erred in permitting the witness, William F. Milliken, to testify, over the objection and exception of the defendant, to certain matters with regard to the number of the automobile in question, the question being as follows:

"Q. Will you describe to the Court and jury what you saw, how that number appeared?"

15. The Court erred in permitting said witness, Milliken, to testify, over the objection and exception of the defendant, to certain statements made by said defendant, and to certain conversations with said defendant, the questions being as follows:

"Q. Will you state as nearly as you now remember just what that conversation was?"

"Q. What else?" [71]

"Q. Did he tell you he came across the country from New York?"

"Q. In what?"

16. The Court erred in making an order, over the objection of the defendant that the witnesses for the Government be allowed to testify in narra-

tive form, and that the defendant be denied the right to make any objection or motion until the narrative of the witness was completed, the said ruling and objection being as follows:

"The COURT.—Now, Counsel, in the beginning of this examination of witnesses I sustained objections that were made by you to permitting witnesses to tell their story to the jury in narrative form, so that you might have the opportunity of making objections when questions were asked and before the answers were made. Now, I thought that would give you an opportunity to interpose what objections you have a right to interpose in protecting the rights of your client. It seems we are going to use up a lot of time if I permit the examination to go ahead in that manner, so I think that, for the purpose of saving time and expediting this trial I will permit the witness to answer the questions that may be propounded by the attorney for the Government in narrative form, and that when the witness has finished his answer you may then interpose such motions and such objections as you see fit. Now, do not interrupt the witness until he has finished his answer in narrative form.

Mr. CUNHA.—To which ruling of the Court we respectfully take an exception.

The COURT.—You have objected to every statement, but do not interrupt this witness until he is through, and [72] then make all the objections you want to. Now, Mr. Fink, frame a question such as you think you would like to ask this witness, and we will proceed."

This occurred during the testimony of the witness, J. W. Ehrlich, and was clearly prejudicial to the defendant in that said ruling denied to the defendant the right to proceed with his trial in accordance with the law, and the ordinary rules of procedure. The ruling was clearly an invasion of the rights of the defendant, and prejudiced the defendant in the eyes of the jury in that it created an impression with the jury that the conduct of the defendant, and his counsel, in making proper objections to the testimony offered by the Government, was an indication of guilt on the part of the defendant and was improper conduct on the part of the defendant.

17. The Court erred in permitting the witness*es*, S. J. Adams, over the objection and exception of the defendant, to testify to certain statements made by the defendant the questions being as follows:

"Q. Do you recall a conversation with this defendant, in which the defendant told you what he knew about how he got the car?

Mr. CUNHA.—I object to that upon all of the grounds heretofore urged as to admissions and statements of this defendant, and upon the further ground it is leading and suggestive.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Do you refer to a conversation as to where he claimed he bought the car? [73]

Mr. FINK.—Yes. You have already testified to that? A. Yes.

Q. Did you have a later conversation in which he stated what he found out about the car?

A. Yes, he said he did not know it was a stolen car until a few days after he left New York.

Q. What did he say about his knowledge at that time?

Mr. CUNHA.—The same objection.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. Well, I cannot exactly say.

Mr. FINK.—Q. Did he say to you, or did he not say to you that he knew it was a stolen car?

A. Yes.

Mr. CUNHA.—Just a moment, I object to that on all of the grounds heretofore urged, and on the ground it calls for the mere conclusion and opinion of the witness, and not binding upon this defendant, no foundation laid, hearsay, and on the further ground it is leading and suggestive.

The COURT.—Overruled.

Mr. CUNHA.—Exception.

A. As I said before, he said that he did not know it was a stolen car until he left New York.

Mr. FINK.—That is all.

Mr. CUNHA.—No questions."

The foregoing is the only testimony of the record to the effect that the automobile in question was stolen. In substance this testimony is clearly hearsay, because at best it is merely a statement of what the defendant had learned. It does not constitute competent evidence that the automobile was stolen and is clearly an attempt to prove the [74]

corpus delicti, by the statements of the defendant, unsupported by any other evidence. The Government failed to produce as a witness anyone who claimed to be the owner of the automobile in question, and did not account for the failure to produce such a witness, and the lack of such testimony, and the failure to produce such witness cannot be made up for by hearsay and incompetent testimony consisting merely of statements by the defendant, for the introduction of which no foundation was laid.

18. The Court erred over the objection and exception of the defendant in denying the motion of said defendant to strike out the testimony of the witnesses for the Government which said motion was made at the conclusion of the testimony for the Government and is as follows:

"Mr. CUNHA.—If your Honor please, at this time I make a motion now that all of the testimony of the witnesses for the Government, and particularly the testimony of the defendant, and conduct on the part of the defendant, that all that testimony be stricken out, upon the ground that no proper foundation has been laid for the testimony, on the ground that there is nothing connected up, and the further ground it is immaterial, irrelevant and incompetent, hearsay, and not binding upon the defendant, upon the ground that it has been merely an attempt to prove the corpus of this offense, the *corpus delicti* by admissions, statements of the defendant, and by conduct on the part of the defendant, which must come in under the head of admis-

sions. I make a motion that all of that testimony be stricken out on all of the grounds heretofore stated, and upon all the grounds urged at the time the testimony was objected to.

The COURT.—Denied.

Mr. CUNHA.—Exception." [75]

19. The Court erred in instructing the jury, over the objection and exception of the defendant as follows:

"The COURT.—Gentlemen, the officer in charge of you has indicated to me that you wish to ask a question.

The FOREMAN.—Yes, your Honor, we do desire to ask you a question about whether or not the defendant should have had knowledge that this was a stolen car.

The COURT.—The language of the indictment, gentlemen, is quite plain. The indictment charges that David Pearlman, on or about July 28th, 1922, in violation of Section 3 of the National Motor Vehicle Act of October 29, 1919, did unlawfully, wilfully, knowingly and feloniously transport and cause to be transported in interstate commerce, to wit: from the city of New York, in the State of New York, to San Francisco, in the State of California, a certain motor vehicle, to wit: a Cadillac automobile, motor No. 18,664, said defendant then and there well knowing that, at the time of said transportation, said motor vehicle had been stolen.

Now, the charge in the indictment is based upon the provisions of the statute. The indictment contains the same language that the statute contains,

that is to say, the same language with reference to transportation and with reference to knowledge. My recollection of the provisions of the statute is that it must be with guilty knowledge, that is to say, the transportation must take place, or must be made by the defendant, the defendant then and there well knowing that at the time of the transportation the motor vehicle had been stolen.

The clerk has handed me the Federal Code, and, referring to that, I find that the language is 'knowing the same to have been stolen.' Those words are in the statute, [76] 'knowing the same to have been stolen.' Does that answer your question?

The FOREMAN.—I think it answers it partly. Must he have had knowledge on the date of July 28th?

The COURT.—On or about that date. My view of that would be that if an offense were committed it might be said to be a continuing offense, that is to say, that he might or might not have known that the automobile had been stolen when he left the State of New York. I take it that if he thereafter had learned that the automobile had been stolen after he left New York and he continued on his way across the country through other States and came to California, I should say that, if you find that that was the evidence, that that would be sufficient to sustain a conviction. Is that clear?

Mr. CUNHA.—On behalf of the defendant, if your Honor please, we except to the instruction just given by the court."

These instructions are erroneous because the defendant was charged specifically in the indictment with transporting the automobile from New York to San Francisco, also when specifically questioned by the jury it became the particular duty of the Court, as it was already the Court's duty to instruct the jury that the burden was upon the Government to prove that the automobile was stolen, and no such instruction was given at any time by the Court in response to the Court's obligation to properly define the elements of the crime in question and the necessary proof in support thereof. [77]

STATEMENTS OF FULL SUBSTANCE OF TESTIMONY ADMITTED OVER THE OBJECTION AND EXCEPTION OF THE DEFENDANT AND PLAINTIFF IN ERROR, AS HERETOFORE REFERRED TO AND POINTED OUT HEREIN IN DEFEDANT'S ASSIGNMENT OF ERROR.

ASSIGNMENT OF ERROR No. 5.

The statements of the defendant testified to in connection with and as pointed out by this assignment is in substance as follows:

"Mr. Pearlman stated that he had purchased the car in New York City from a second-hand auto market at Third Avenue and Thirteenth Street, and that he did not know the seller's name. That he drove the car direct to San Francisco from New York with the exception of a stop over at Salt Lake. He had a bill of sale for the car that was issued in Los Angeles and was made out to a man

by the name of Lewis; some second-hand auto market there.

ASSIGNMENT OF ERROR No. 6.

The testimony of the witness, Adams, which should have been stricken out as claimed by this assignment of error is the testimony immediately given above under assignment of error No. 5.

ASSIGNMENT OF ERROR Nos. 7, 8, 9, 10.

The statements of the defendant testified to in connection with, and as pointed out by these assignments of error is as follows:

"The defendant told me he purchased the car in the City of New York on July 28th; that he left New York the latter part of July and got to San Francisco about September [78] 6th. The bill of sale to which I testified was dated Los Angeles the 14th of August, and the heading on the stationery was "Lewis." In my examination of the motor block I noticed a change or attempt to change the number."

ASSIGNMENT OF ERROR Nos. 11 and 12.

The statements of the defendant testified to and over the objection and exception of the defendant as pointed out in these assignments of error is as follows:

"The defendant was asked what had become of the $2,100.00 which had been given him by the chinaman and he said he had owed a party $1,500.00 and had forwarded it that day, September 6th, and he was in possession of $600.00 when we searched him. The defendant admitted he had

purchased the Cadillac Sedan in New York City from in front of Browns' Auction House and said he paid the sum of $1,000.00 for it. The defendant stated he had come out from New York as far as Salt Lake City and had gone from Salt Lake City to Los Angeles via one of the trails."

ASSIGNMENT OF ERROR No. 13.

The testimony which should have been stricken out as indicated in this assignment of error is the testimony quoted immediately above in connection with assignment of error Numbers 11 and 12.

ASSIGNMENT OF ERROR Nos. 14 and 15.

The testimony admitted over the objection and exception of the defendant as indicated and pointed out by these assignments of error is as follows:

"It was very apparent that the number had been changed; there was no series letter." "The defendant stated [79] that he had purchased the car for $1,000.00 in New York and had driven it through to Salt Lake City and then to Los Angeles where he had registered it and then to San Francisco. I asked the defendant if he knew the car was stolen and he would not make much of a further statement. He said he had driven the car as far as Salt Lake City and then turned South and then went into Los Angeles, in this particular Cadillac Sedan."

ASSIGNMENT OF ERROR No. 18.

The testimony which should have been stricken out as indicated by this assignment of error con-

stituted and is all of the testimony heretofore referred to and quoted and set forth in substance in connection with all the foregoing assignments of error.

A careful perusal and scrutiny of all of the testimony in the record will show that the only testimony offered to prove that the automobile was transported or driven or conveyed by the defendant, consisted of alleged statements made by the defendant and testified to by Government witnesses; and these statements of the defendant are absolutely unsupported by any other competent testimony; and with regard to alleged changes made in connection with the number of the automobile, or otherwise, there is absolutely no testimony as to when these changes were made and nothing to indicate that they were made by the defendant. The fact that the automobile in question was stolen and that it was actually transported by the defendant were essential parts of the *corpus delicti* to be established, and there is no attempt to establish these elements except by statements of [80] the defendant, and therefore, the proof in this connection is absolutely insufficient, and the testimony covering statements of the defendant should have been rejected by the court under the objections of the defendant.

WHEREFORE, said defendant, and plaintiff in error, prays that the judgment and sentence herein may be reversed, and that he may be restored to all things that he has lost thereby, and that he may be awarded a new trial.

Dated April 22, 1925.

EDWARD A CUNHA,
Attorney for Defendant and Plaintiff in Error.

[Endorsed]: Rcd. a copy Apr. 22, 1925.

STERLING CARR,
U. S. Atty.

Filed Apr. 22, 1925. Walter B. Maling, Clerk. By. C. W. Calbreath, Deputy Clerk. [81]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 11,782.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID PEARLMAN,
Defendant.

ORDER ALLOWING WRIT OF ERROR AND SUPERSEDEAS.

The writ of error and the supersedeas herein prayed for by David Pearlman, defendant and plaintiff in error, pending the decision upon said writ of error, is hereby allowed and the defendant is admitted to bail upon the writ of error in the sum of Five Thousand Dollars.

The bond for costs on the writ of error is hereby fixed at Two Hundred Fifty and No. 100 ($250.00) Dollars.

Dated 22d day of April, 1925.

A. F. St. SURE,
United States District Judge.

[Endorsed]: Rcd. a copy 4-22-1925.

STERLING CARR,
U. S. Atty.

Filed Apr. 22, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [82]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 82 pages, numbered from 1 to 82, inclusive, contain a full, true and correct transcript of the records and proceedings, in the case of United States vs. David Pearlman, No. 11,782, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to the praecipe for transcript (copy of which is embodied herein).

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of thirty-two dollars and fifty-five cents ($32.55) and that the same has been paid to me by the plaintiff in error herein.

Annexed hereto are the original writ of error, return to writ of error, and original citation on writ of error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 29th day of April, A. D. 1925.

[Seal] WALTER B. MALING,
Clerk,
By C. M. Taylor,
Deputy Clerk. [83]

WRIT OF ERROR.

United States of America.—ss.

The President of the United States of America,
To the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETINGS:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States of America, defendant in error, a manifest error hath happened, to the great damage of the said David Pearlman, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date

hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 22d day of April, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.
By C. W. Calbreath,
Deputy Clerk.

Allowed by
A. F. St. SURE,
United States District Judge. [84]

Rec'd a copy, 4-22-25.
STERLING CARR,
U. S. Atty.

[Endorsed]: No. 11782. United States District Court for the Northern District of California, First Division. United States of America, Plaintiff in Error, vs. David Pearlman, Defendant in Error. Writ of Error. Filed Apr. 22, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

RETURN TO WRIT OF ERROR.

The answer of the Judges of the United States District Court, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 29th day of April, A. D. 1925, duly lodged in the case in this court for the within named defendant in error.

By the Court.

[Seal] WALTER B. MALING,

Clerk, U. S. District Court, Northern Dist. of California.

By C. M. Taylor,
Deputy Clerk. [85]

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States, to the United States of America, and to Sterling Carr, Esq., United States Attorney, and to Grove J. Fink, Esq., and Thomas J. Sheridan, Esq., Assistants to the United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a

writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein David Pearlman, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Northern District of California, this 22d day of April, A. D. 1925.

A. F. ST. SURE,
United States District Judge.

Recd. a copy 4/22/25.

STERLING CARR,
U. S. Atty.

[Endorsed]: No. 11,782. United States District Court for the Northern District of California. United States of America, Plaintiff in Error, vs. David Pearlman, Defendant in Error. Citation on Writ of Error. Filed Apr. 22, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [86]

[Endorsed]: No. 4585. United States Circuit Court of Appeals for the Ninth Circuit. David Pearlman, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division

of the United States District Court of the Northern District of California, First Division.

Received April 29, 1925.

F. D. MONCKTON,
Clerk.

Filed May 11, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4585

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

6

DAVID PEARLMAN,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD A. CUNHA,
Flood Building, San Francisco,
Attorney for Plaintiff in Error.

FILED
NOV - 7 1925
F. D. MONCKTON

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 4585

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

David Pearlman,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error, who will hereafter be referred to as the defendant, was accused by indictment of the violation of Section III of the National Motor Vehicle Act of October 29th, 1919. The indictment alleging that the defendant did on or about July 28, 1922, unlawfully, wilfully, knowingly and feloniously transport and caused to be transported from the City of New York to the City of San Francisco a certain Cadillac automobile, the defendant then and there well knowing that at the time of said transportation said automobile had been stolen.

On November 10, 1922, the defendant pleaded not guilty and upon March 16, 1925, the defendant was tried and on March 17, 1925, a verdict of guilty

was returned by the jury. Thereupon the defendant made a motion for a new trial which was denied and a motion in arrest of judgment which was denied, and thereafter and on the 17th day of March, 1925, the court pronounced judgment upon the defendant and ordered that the defendant be imprisoned for five years in the United States penitentiary at Leavenworth, Kansas, and ever since the defendant has been incarcerated under said sentence and is now in the United States penitentiary, being at no time able to furnish the amount of bail set by the court.

The conviction of this defendant amounts to an attempt on the part of the Government to insist upon a judgment of conviction where the case against the defendant is entirely infirm in certain specific and essential features, and where the defendant has been convicted on evidence that is absolutely inadequate and insufficient. The plain, simple fact is, that the Government proceeded to trial in this case without certain witnesses necessary to the establishment of the true facts of the case, who were living in New York, and who should have been present to testify with regard to the facts and circumstances under which the automobile in question was taken from New York, and whose testimony we are confident would have established the innocence of the defendant. The owner, or alleged owner of the automobile was not produced as a witness and there is no proof in the case that the automobile in question ever had an owner, except the defendant.

There is no proof that the owner of the automobile in question did not consent that it might be taken by the defendant, assuming that the defendant was not and is not the owner of the automobile, and all this amounts to lack of proof that the automobile ever was or could have been stolen. There is no proof that the automobile was transported from New York to San Francisco, except certain alleged admissions by the defendant which admissions were improperly allowed in evidence over the objection of the defendant, and which should have been stricken out in response to the defendant's motion, particularly on account of the fact that no foundation was laid for the introduction of proof of these admissions, in this, that there was no evidence to prove the *corpus delicti,* except these extra-judicial statements of the defendant; and furthermore, the infirmities of the case for the Government were directly struck at by the defendant by a proper and seasonable motion made at the termination of the Government's case requesting the court to instruct the jury to acquit the defendant, which motion should have been granted, because even allowing for the testimony which was improperly admitted and which should have been stricken out, the Government had failed to meet its obligation to establish the essential elements of the offense by proper and sufficient testimony.

SPECIFICATIONS OF ERRORS RELIED UPON.

I.

The court erred in not instructing the jury to acquit said defendant at the conclusion of the presentation of the case for the Government and of all of the evidence for the Government against said defendant. The evidence was insufficient to establish the allegations of the indictment or to convict said defendant and plaintiff in error, particularly in that it was not proven or established that the automobile in question and referred to in the indictment was stolen, and for the further reason that it was not proven or established that the said automobile was transported or driven or taken any place, or from state to state by said defendant. There was no proof that the automobile named in the indictment ever had an owner, or that anyone other than said defendant was the owner of said automobile, or that the owner if any, of said automobile did not consent to the taking of the same by said defendant; there was no proof of a larceny or the stealing of said automobile by anyone; the only evidence covering the matters referred to in this paragraph consisted of alleged statements by the defendant and this evidence was incompetent and hearsay, because it was an attempt on the part of the Government to establish the *corpus delicti* of the offense alone by the admissions and statements of the defendant, when no other evidence had been introduced or was later introduced to establish the *corpus delicti*. The defendant and plaintiff in

error raised the various questions herein pointed out by appropriate and timely exceptions to the introduction of the evidence of the Government and by appropriate and timely motions to strike out the evidence of the Government and by a motion for a directed verdict of not guilty, which said motion for a directed verdict was made at the conclusion of the Government's case, and to the court's orders overruling defendant's objections to the introduction of said testimony and denying said motions defendant and plaintiff in error duly excepted.

II.

The court erred in overruling and denying the motion for a new trial made by said defendant.

III.

The court erred in overruling and denying the motion in arrest of judgment made by said defendant.

IV.

The court erred in denying the motion of said defendant to strike out certain testimony of the witnesses for the Government, which said motion was made at the conclusion of the case of the Government upon said trial.

V.

The court erred in permitting the witness S. J. Adams to testify, over the objection and exception

of the defendant to certain statements made by the defendant, the question being as follows:

"Q. Now will you relate to the court and to the jury as near as you now remember it, Mr. Adams, the conversation as it relates to the matter in question?"

VI.

The court erred in denying defendant's motion to strike out certain testimony of said witness, Adams, which said motion and the exception to the ruling of the court is as follows:

"Mr. Cunha. Now if your Honor please, keeping in mind that perhaps your Honor will direct the order of proof, I make a motion that *that* the testimony of this witness in which he states that the defendant told him that he had driven the car across the continent, anything with regard to driving the car, be stricken from the record on the ground it is immaterial, irrelevant and incompetent, and an attempt to prove the *corpus delicti* in this case by a confession or a statement of the defendant. I take it, if your Honor please, that you have the discretion as to the order of proof, but to prove the *corpus* of the offense by admissions or statements of the defendant, I think it will be conceded it is beyond the law and is an invasion of the rights of this defendant. That is the point that we make, if your Honor please, that finally in this case the *corpus delicti* must be proved—

The Court. I do not want any argument; just state the point fully.

Mr. Cunha. We base our motion to strike out all of the testimony given by the witness on all of the grounds heretofore stated.

The Court. Motion denied.

Mr. Cunha. Exception."

VII.

The court erred in permitting the said witness, Adams, to testify, over the objection and exception of the defendant, to certain statements made by the defendant, the question being as follows:

"Q. What was the date of the purchase, the date that the defendant told you he purchased the car in the City of New York, if you remember?

Mr. Cunha. We object to that upon all the grounds heretofore stated, and upon the ground it is immaterial, irrelevant, and incompetent, calls for hearsay testimony, on the further ground that no foundation for the evidence has been offered or introduced, upon the further ground that all of this testimony with regard to conversations with the defendant or conduct of the defendant with regard to the bill of sale and otherwise in connection with this automobile is merely an attempt to prove the *corpus delicti* in this case by admissions from the defendant or statements from the defendant either by conduct or by actual verbal statements, and it is incompetent.

The Court. Overruled.

Mr. Cunha. Exception.

The COURT. You have several times quite fully stated your objection. It will save time if it is understood or that it be stipulated that your objection goes to the testimony of this witness concerning the conversation or statements made by the defendant to him, and also with regard to anything having to do with bills of sale or anything else about that machine.

Mr. CUNHA. And may we have our exception?

The COURT. I am willing that you should."

VIII.

The court erred in allowing said witness, Adams, to testify, over the objection and exception of the defendant, to certain statements of the defendant, the question being as follows:

"Q. Did he tell you what date he arrived here—go ahead with your story?"

IX.

The court erred in permitting the witness, Adams, over the objection and exception of the defendant, to testify to the contents of a certain bill of sale, the objection of the defendant being based upon the ground, among others, that the evidence introduced was not the best evidence, some of the said questions being as follows:

"Q. Now referring again to the bill of sale to which you testified I will renew the question that I withdrew, do you now remember where the bill of sale was dated?"

"Q. Do you remember about the date shown on that bill of sale?"

"Q. Do you remember the name of the man who signed it?"

The Government laid no foundation for the introduction of secondary evidence in this connection.

X.

The court erred in permitting said witness, Adams, to testify, over the objection and exception of the defendant, to certain matters concerning the number of the automobile in question, the said question being as follows:

"Q. In your examination of the motor block or wherever the number happens to be, did you notice any change or attempt to change the number?"

XI.

The court erred in permitting the witness, M. L. Britt, to testify, over the objection and exception of the defendant, to certain statements made by the defendant, the questions being as follows:

"Q. Will you state to the court and jury as near as you remember just the conversation at that time as it relates to this change here before this court and jury?

Q. What did he say?

Q. Was there any conversation concerning the car, the Cadillac Sedan which was in the *possession Leong* when you first saw it?

Q. Did he tell you what he paid for it?"

XII.

The court erred in permitting the said witness, Britt, to testify, over the objection and exception of the defendant, to certain statements made by the defendant concerning his movements, the said question being as follows:

"Q. What if anything was said by him concerning his method of going to San Francisco?"

This was clearly an attempt on the part of the Government to prove the *corpus delicti* by the statements of the defendant, unsupported by any other testimony.

XIII.

The court erred in denying the motion of the defendant, to strike out the testimony of the said witness, Britt, which said motion was made at the conclusion of the testimony of said witness, the said motion and ruling being as follows:

"Mr. Cunha. We make a motion that all of the testimony of this witness upon all the grounds heretofore urged be stricken out, especially objecting to the admission of statements in evidence of this defendant and conduct of this defendant, and ask that they all be stricken from the record upon all the grounds heretofore urged.

The Court. Motion *died.*

Mr. Cunha. Exception.

XIV.

The court erred in permitting the witness, William F. Milliken, to testify, over the objection and

exception of the defendant, to certain matters with regard to the number of the automobile in question, the question being as follows:

"Q. Will you describe to the court and jury what you saw, how that number appeared?"

XV.

The court erred in permitting said witness, Milliken, to testify, over the objection and exception of the defendant, to certain statements made by said defendant, and to certain conversations with said defendant, the questions being as follows:

"Q. Will you state as nearly as you now remember just what that conversation was?

Q. What else?

Q. Did he tell you he came across the country from New York?

Q. In what?"

XVI.

The court erred in making an order, over the objection of the defendant that the witnesses for the Government be allowed to testify in narrative form, and that the defendant be denied the right to make any objection or motion until the narrative of the witness was completed, the said ruling and objection being as follows:

"The Court. Now, counsel, in the beginning of this examination of witnesses I sustained objections that were made by you to permitting witnesses to tell their story to the jury in narrative form, so that you might have the opportunity of making

objections when questions were asked and before the answers were made. Now, I thought that would give you an opportunity to interpose what objections you have a right to interpose in protecting the rights of your client. It seems we are going to use up a lot of time if I permit the examination to go ahead in that manner, so I think that, for the purpose of saving time and expediting this trial I will permit the witness to answer the questions that may be propounded by the attorney for the Government in narrative form, and that when the witness has finished his answer you may then interpose such motions and such objections as you see fit. Now, do not interrupt the witness until he has finished his answer in narrative form.

Mr. Cunha. To which ruling of the court we respectfully take an exception.

The Court. You have objected to every statement, but do not interrupt this witness until he is through, and then make all the objections you want to. Now, Mr. Fink, frame a question such as you think you would like to ask this witness, and we will proceed."

This occurred during the testimony of the witness, J. W. Ehrlich, and was clearly prejudicial to the defendant in that said ruling denied to the defendant the right to proceed with his trial in accordance with the law, and the ordinary rules of procedure. The ruling was clearly an invasion of the rights of the defendant, and prejudiced the defendant in the eyes of the jury in that it created an impres-

sion with the jury that the conduct of the defendant, and his counsel, in making proper objections to the testimony offered by the Government, was an indication of guilt on the part of the defendant and was improper conduct on the part of the defendant.

XVII.

The court erred in permitting the witness*es*, S. J. Adams, over the objection and exception of the defendant, to testify to certain statements made by the defendant, the questions being as follows:

"Q. Do you recall a conversation with this defendant, in which the defendant told you what he knew about how he got the car?

Mr. Cunha. I object to that upon all of the grounds heretofore urged as to admissions and statements of this defendant, and upon the further ground it is leading and suggestive.

The Court. Overruled.

Mr. Cunha. Exception.

A. Do you refer to a conversation as to where he claimed he bought the car?

Mr. Fink. Yes. You have already testified to that?

A. Yes.

Q. Did you have a later conversation in which he stated what he found out about the car?

A. Yes, he said he did not know it was a stolen car until a few days after he left New York.

Q. What did he say about his knowledge at that time?

Mr. Cunha. The same objection.

The COURT. Overruled.

Mr. CUNHA. Exception.

A. Well, I cannot exactly say.

Mr. FINK. Q. Did he say to you, or did he not say to you that he knew it was a stolen car?

A. Yes.

Mr. CUNHA. Just a moment, I object to that on all of the grounds heretofore urged, and on the ground it calls for the mere conclusion and opinion of the witness, and not binding upon this defendant, no foundation laid, hearsay, and on the further ground it is leading and suggestive.

The COURT. Overruled.

Mr. CUNHA. Exception.

A. As I said before, he said that he did not know it was a stolen car until he left New York.

Mr. FINK. That is all.

Mr. CUNHA. No questions."

The foregoing is the only testimony of the record to the effect that the automobile in question was stolen. In substance this testimony is clearly hearsay, because at best it is merely a statement of what the defendant had learned. It does not constitute competent evidence that the automobile was stolen and is clearly an attempt to prove the *corpus delicti*, by the statements of the defendant, unsupported by any other evidence. The Government failed to produce as a witness anyone who claimed to be the owner of the automobile in question, and did not account for the failure to produce such a witness, and the lack of such testimony, and the

failure to produce such witness cannot be made up for by hearsay and incompetent testimony consisting merely of statements by the defendant, for the introduction of which no foundation was laid.

XVIII.

The court erred over the objection and exception of the defendant in denying the motion of said defendant to strike out the testimony of the witnesses for the Government which said motion was made at the conclusion of the testimony for the Government and is as follows:

"Mr. Cunha. If your Honor please, at this time I make a motion now that all of the testimony of the witnesses for the Government, and particularly the testimony of the defendant. and conduct on the part of the defendant, that all that testimony be stricken out, upon the ground that no proper foundation has been laid for the testimony, on the ground that there is nothing connected up, and the further ground it is immaterial, irrelevant and incompetent, hearsay, and not binding upon the defendant, upon the ground that it has been merely an attempt to prove the corpus of this offense, the *corpus delicti* by admissions, statements of the defendant, and by conduct on the part of the defendant, which must come in under the head of admissions. I make a motion that all of that testimony be stricken out on all of the grounds heretofore stated, and upon all the grounds urged at the time the testimony was objected to.

The Court. Denied.
Mr. Cunha. Exception."

XIX.

The court erred in instructing the jury, over the objection and exception of the defendant as follows:

"The Court. Gentlemen, the officer in charge of you has indicated to me that you wish to ask a question.

The Foreman. Yes, your Honor, we do desire to ask you a question about whether or not the defendant should have had knowledge that this was a stolen car.

The Court. The language of the indictment, gentlemen, is quite plain. The indictment charges that David Pearlman, on or about July 28, 1922, in violation of Section 3 of the National Motor Vehicle Act of October 29, 1919, did unlawfully, willfully, knowingly and feloniously transport and cause to be transported in interstate commerce, to wit: from the City of New York, in the State of New York, to San Francisco, in the State of California, a certain motor vehicle, to wit: a Cadillac automobile, motor No. 18,664, said defendant then and there well knowing that, at the time of said transportation, said motor vehicle had been stolen.

Now, the charge in the indictment is based upon the provisions of the statute. The indictment contains the same language that the statute contains, that is to say, the same language with reference to transportation and with reference to knowledge.

My recollection of the provisions of the statute is that it must be with guilty knowledge, that is to say, the transportation must take place, or must be made by the defendant, the defendant then and there well knowing that at the time of the transportation the motor vehicle had been stolen.

The clerk has handed me the Federal Code, and, referring to that, I find that the language is 'knowing the same to have been stolen.' Those words are in the statute, 'knowing the same to have been stolen.' Does that answer your question?

The FOREMAN. I think it answers it partly. Must he have had knowledge on the date of July 28th?

The COURT. On or about that date. My view of that would be that if an offense were committed it might be said to be a continuing offense, that is to say, that he might or might not have known that the automobile had been stolen when he left the State of New York. I take it that if he thereafter had learned that the automobile had been stolen after he left New York and he continued on his way across the country through other states and came to California, I should say that, if you find that that was the evidence, that that would be sufficient to sustain a conviction. Is that clear?

Mr. CUNHA. On behalf of the defendant, if your Honor please, we except to the instruction just given by the court."

These instructions are erroneous because the defendant was charged specifically in the indictment

with transporting the automobile from New York to San Francisco, also when specifically questioned by the jury it became the particular duty of the court, as it was already the court's duty to instruct the jury that the burden was upon the Government to prove that the automobile was stolen, and no such instruction was given at any time by the Court in response to the court's obligation to properly define the elements of the crime in question and the necessary proof in support thereof.

Statements of full substance of testimony admitted over the objection and exception of the defendant and plaintiff in error, as heretofore referred to and pointed out herein in defendant's assignment of error.

Assignment of Error No. 5.

The statements of the defendant testified to in connection with and as pointed out by this assignment is in substance as follows:

"Mr. Pearlman stated that he had purchased the car in New York City from a second-hand auto market at Third Avenue and Thirteenth Street, and that he did not know the seller's name. That he drove the car direct to San Francisco from New York with the exception of a stop over at Salt Lake. He had a bill of sale for the car that was issued in Los Angeles and was made out to a man by the name of Lewis; some second-hand auto market there.

Assignment of Error No. 6.

The testimony of the witness, Adams, which should have been stricken out as claimed by this assignment of error is the testimony immediately given above under assignment of error No. 5.

Assignment of Error Nos. 7, 8, 9, 10.

The statements of the defendant testified to in connection with, and as pointed out by these assignments of error is as follows:

"The defendant told me he purchased the car in the City of New York on July 28th; that he left New York the latter part of July and got to San Francisco about September 6th. The bill of sale to which I testified was dated Los Angeles the 14th of August, and the heading on the stationery was 'Lewis.' In my examination of the motor block I noticed a change or attempt to change the number."

Assignment of Error Nos. 11 and 12.

The statements of the defendant testified to and over the objection and exception of the defendant as pointed out in these assignments of error is as follows:

"The defendant was asked what had become of the $2100.00 which had been given him by the Chinaman and he said he had owed a party $1500.00 and had forwarded it that day, September 6th, and he was in possession of $600.00 when we searched him. The defendant admitted he had purchased

the Cadillac Sedan in New York City from in front of Browns' Auction House and said he paid the sum of $1000.00 for it. The defendant stated he had come out from New York as far as Salt Lake City and had gone from Salt Lake City to Los Angeles via one of the trails."

Assignment of Error No. 13.

The testimony which should have been stricken out as indicated in this assignment of error is the testimony quoted immediately above in connection with assignment of error numbers 11 and 12.

Assignment of Error Nos. 14 and 15.

The testimony admitted over the objection and exception of the defendant as indicated and pointed out by these assignments of error is as follows:

"It was very apparent that the number had been changed; there was no series letter." "The defendant stated that he had purchased the car for $1000.00 in New York and had driven it through to Salt Lake City and then to Los Angeles where he had registered it and then to San Francisco. I asked the defendant if he knew the car was stolen and he would not make much of a further statement. He said he had driven the car as far as Salt Lake City and then turned south and then went into Los Angeles, in this particular Cadillac Sedan."

Assignment of Error No. 18.

The testimony which should have been stricken out as indicated by this assignment of error con-

stituted and is all of the testimony heretofore referred to and quoted and set forth in substance in connection with all the foregoing assignments of error.

A careful perusal and scrutiny of all of the testimony in the record will show that the only testimony offered to prove that the automobile was transported or driven or conveyed by the defendant, consisted of alleged statements made by the defendant and testified to by Government witnesses; and these statements of the defendant are absolutely unsupported by any other competent testimony; and with regard to alleged changes made in connection with the number of the automobile, or otherwise, there is absolutely no testimony as to when these changes were made and nothing to indicate that they were made by the defendant. The fact that the automobile in question was stolen and that it was actually transported by the defendant were essential parts of the *corpus delicti* to be established, and there is no attempt to establish these elements except by statements of the defendant, and therefore, the proof in this connection is absolutely insufficient, and the testimony covering statements of the defendant should have been rejected by the court under the objections of the defendant.

ARGUMENT.

The court erred in not instructing the jury to acquit said defendant at the conclusion of the pres-

entation of the case for the Government and of all of the evidence for the Government against said defendant. The evidence was insufficient to establish the allegations of the indictment or to convict said defendant and plaintiff in error, particularly in that it was not proven or established that the automobile in question and referred to in the indictment was stolen, and for the further reason that it was not proven or established that the said automobile was transported or driven or taken any place, or from state to state by said defendant, or that the automobile was ever in New York. There was no proof that the automobile named in the indictment ever had an owner, or that anyone other than said defendant was the owner of said automobile, or that the owner if any, of said automobile did not consent to the taking of the same by said defendant; there was no proof of a larceny or the stealing of said automobile by anyone; the only evidence covering the matters referred to in this paragraph consisted of alleged statements by the defendant and this evidence was incompetent and hearsay, because it was an attempt on the part of the Government to establish the *corpus delicti* of the offense alone by the admissions and statements of the defendant, when no other evidence had been introduced or was later introduced to establish the *corpus delicti*.

The *corpus delicti* consists of the elements of the crime in question.

People v. Tapia, 131 Cal. 647;
People v. Simonsen, 107 Cal. 346;
People v. Vertrees, 169 Cal. 404;
People v. Quarez, 70 Cal. Dec. 60 (decision concurred in by all the Justices of the Supreme Court of California).

In the instant case it must be conceded that the elements of the crime essential to the Government's case, involve at least the following propositions:

(a) That the automobile was transported by the defendant;

(b) That at the time it was a stolen automobile;

(c) That the defendant at the time knew that it was a stolen automobile.

That the automobile was in fact a stolen car is here recited as an essential element or part of the *corpus delicti,* because, proof that the defendant knew the automobile was stolen necessarily involves proof first that the automobile was in fact a stolen automobile. Proof of stealing or larceny with regard to particular personal property necessarily includes proof of ownership or right to possession in some one other than the defendant, under such circumstances that the property might be the subject of larceny; and furthermore, there must be proof that the property in question was taken without the consent of the owner or the one entitled to the possession of the property; and in the instant case there is a glaring failure of proof in this regard, because it is not shown that the automobile in ques-

tion ever had an owner or was ever in the possession of any one entitled to it, except the defendant; and if we invade the rights of the defendant and assume that someone other than the defendant owned the automobile or was entitled to its possession in New York, we then face the proposition that there is absolutely no proof that the owner or the person interested in its possession did not consent to the taking of the automobile by the defendant.

With regard to the other essential element, namely: the transportation of the automobile, there is absolutely no proof in the record other than certain alleged statements by the defendant hereinafter referred to. No witness testified that the automobile was ever out of California. It is true that the Government produced the testimony of the witness, Sutton (Transcript, page 43). But this witness testified merely that on August 10, 1922, a registration was made in a book of the Newhouse Hotel in Salt Lake City, Utah, under the name of Mr. and Mrs. D. Pearlman. This testimony at most establishes only that the defendant was in Salt Lake City on the date in question. In connection with this matter there is no proof whatever that the defendant was seen in the possession of any automobile in Salt Lake City, or that he drove any automobile or transported any automobile while in Salt Lake City, and it is not necessary to comment to any extent upon the fact that it is possible to obtain transportation to Salt Lake City, Utah, by some other means than an automobile conveyance;

and so we can find that there is a glaring failure of proof with regard to the element of transportation, a necessary part of the proof in this case.

It is true that the Government proved that the defendant, while in California, sold or traded the automobile, that he obtained a license in his name, but all of these acts as proved are entirely consistent with the innocence of the defendant. Even the fact that the engine number was not a Cadillac number is harmless in this case, because there is no proof that the defendant was responsible for it or had knowledge of it, and no proof as to when the change, if any, was made or whether it was made, if made at all, before or after the automobile came into the possession of or was bought by the defendant, and no proof that the automobile ever had a Cadillac engine number.

We come now to an important feature of the case, because it involves certain rulings of the trial court which were clearly erroneous. There is certain testimony in the record bearing upon the *corpus delicti* in the nature of alleged admissions or statements by the defendant, made at or about the time of his arrest or subsequent thereto. The witness, Adams, when recalled by the Government, in a desperate effort to bolster up the case testified as follows:

"Q. Did you have a later conversation in which he (referring to the defendant), stated what he found out about the car?

A. Yes, he said he did not know it was a stolen car until a few days after he left New York" (Transcript, page 56).

And this same witness, Adams, and certain other witnesses, testified that the defendant said he had bought the car in New York and had driven it to San Francisco, and they also testified that the defendant exhibited a bill of sale dated at Los Angeles, California, and signed by a man named Lewis.

In the first place the alleged statement by the defendant to the effect that he *did not know* it was a stolen car until after he had left New York, taken by itself is at best purely hearsay, and involves at best a mere conclusion or opinion and has no probative force whatever; and the fact that the defendant bought the car in New York and subsequently had his title confirmed by a bill of sale in Los Angeles, California, is not disproved by the Government and in this connection the fact stands out in bold relief in this case that Henry R. Leong, the witness produced by the Government who testified that he purchased the automobile in question from the defendant and obtained title through the medium of the defendant and by means of the defendant's claims upon the automobile in question, apparently obtained good and sufficient title to the automobile because, the record shows that Mr. Leong's ownership or title in the automobile, thus obtained, has never been disturbed, or disputed.

But if it is claimed that the alleged admissions and statements of the defendant have some evidentiary value, the important proposition remains that these alleged statements and admissions were inadmissible because, they consist of extra-judicial statements of the defendant forced into the record against the defendant by the Government in a case where there is absolutely no other proof of the *corpus delicti.* These alleged admissions and statements were properly objected to by the defendant by timely and adequate objections which were overruled (see Assignments of Error 5 to 15 inclusive, pages 81 to 84 of Transcript, also Assignment of Error No. 17, pages 87 and 88 of Transcript). And in order to avoid any question with regard to the order of proof the defendant at the conclusion of the Government's case made a proper motion to strike out all of this testimony (see Assignment of Error No. 18, page 89 of Transcript, and pages 94 and 95 of Transcript). And all of these matters with regard to the failure of proof on the part of the Government were adequately and properly covered by a motion made by the defendant at the conclusion of the Government's case, for an instruction by the court directing the jury to acquit the defendant (see Assignment of Error No. 1, page 79 of Transcript). See exceptions covering motion to strike out and motion for instructed verdict of acquittal, pages 62 and 63 of Transcript.

The proposition that extra-judicial statements of a defendant are insufficient to establish the *corpus*

delicti and that such statements are inadmissible unless, as a foundation for their admission, the *corpus delicti* is established by other proof, is as well recognized and as thoroughly established in criminal jurisprudence as the rule and the principle that a defendant cannot be forced to be a witness against himself.

In the recent case of the *People of the State of California v. D. Quarez,* 70 Cal. Dec. page 60, the Supreme Court of the State of California, in a decision concurred in by all of the justices of that court, has discussed in some detail the principles of law here involved, and the law set out in this decision as well as the cases therein cited clearly establishes the propositions contended for by the defendant in the instant case. The following are some of the decisions cited:

People v. Chadwick, 4 Cal. App. 63;
People v. Jones, 31 Cal. 565;
People v. Simonsen, 107 Cal. 345;
People v. Tapia, 131 Cal. 647;
People v. Vertrees, 169 Cal. 404;
People v. Johnson, 47 Cal. App. Dec. 392;
People v. Whiteman, 114 Cal. 338.

We also cite the case of *Naftzger v. U. S.,* 200 Fed. 494 (and cases enumerated at page 498).

On the part of this defendant it is also important to point out the matters involved in Assignment of Error No. 19 (page 90, Transcript). After the jury had deliberated for some time upon this case and had been unable to agree upon the verdict they

came into court and asked for certain instructions and thereupon the court instructed the jury as set forth in pages 90 to 92 of the Transcript. The jury unquestionably felt that there was a lack of proof covering the matter of the larceny of the automobile and the defendant's knowledge of the same as indicated by the questions asked of the court by the jury. We submit that these instructions complained of are erroneous because the defendant was charged specifically in the indictment with transporting an automobile from New York to San Francisco knowing the same to be stolen and when this whole matter was specifically touched upon by the jury it became the particular duty of the court, as it was already the court's duty (not complied with), to instruct the jury that the burden was upon the Government to prove that the automobile was in fact a stolen automobile and no such instruction was given then or at any other time by the court in response to the court's obligation to properly and completely define the elements of the crime in question and the necessary proof in support thereof.

The atmosphere of the trial of this case became one of hostility toward the defendant and his rights, and the defendant was deprived of a fair trial by reason of the erroneous ruling of the court and the prejudicial misconduct of the court as set forth and pointed out in Assignment of Error No. 16, appearing on pages 85, 86 and 87 of the Transcript. On account of the repeated efforts of the District Attorney to introduce evidence which was not admissible it of course became necessary for the defendant

to make repeated objections. In the ruling complained of the court criticized the defendant for making these objections and ruled that thereafter the witnesses of the Government should be allowed to tell all they knew about the case in narrative form, the defendant to merely have the right to make motions to strike out and objections after all of the testimony, including prejudicial and inadmissible testimony, had been heard by the jury. In other words, the procedure imposed upon the defendant by this ruling meant that the District Attorney should ask the witnesses a question, such as the following: "Mr. Witness, please state to the jury everything which you know about this case," and the defendant and his counsel were expected to remain mute while the story was being told and thereafter attempt to repair the damage done by making motions to strike out inadmissible and prejudicial testimony. After ruling that the witnesses should be allowed to testify in narrative form the court said, "you have objected to every statement, but do not interrupt this witness until he is through, *and then make all the objections you want to.*"

We most respectfully assert that a defendant has a right to object to *every statement* if as a matter of fact each and every statement sought to be introduced is inadmissible in evidence for specific and well recognized reasons. This incident occurred during the testimony of the witness Ehrlich, and was clearly prejudicial to the defendant in that the ruling denied to the defendant the right to proceed with his trial in accordance with the law and the

recognized and established rules of procedure. It may be claimed that the District Attorney did not take full advantage of this ruling, but nevertheless the damage was done by the ruling and it created an atmosphere of hostility toward the defendant and amounted to an invasion of the ordinary rights of the defendant, and prejudiced the defendant in the eyes of the jury in that it created an impression with the jury that the conduct of the defendant in making proper objections to the testimony offered by the Government was an indication of guilt on the part of the defendant and was improper conduct on the part of the defendant. It is impossible to clearly portray here the damaging effect of this ruling upon the cause of the defendant and the extent to which it disconcerted and humiliated counsel for the defendant, but the defendant and his counsel earnestly and sincerely assert that the prejudicial effect of this ruling had considerable to do with bringing about a verdict adverse to the defendant.

We respectfully submit that for the reasons stated and set forth in this brief, and upon all of the matters and things in the record in this case as submitted, the judgment of the lower court should be reversed.

Dated, San Francisco,
November 4, 1925.

EDWARD A. CUNHA,
Attorney for Plaintiff in Error.

4535

No. ~~4584~~

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

7

DAVID PEARLMAN, *Plaintiff in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	

BRIEF FOR DEFENDANT IN ERROR.

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No. 4584

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID PEARLMAN, *Plaintiff in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

David Pearlman, plaintiff in error, prosecutes a writ of error to the District Court of the Northern District of California to reverse a sentence imposed against him upon his conviction of the violation of the National Motor Vehicle Theft Act.

On September 29, 1922, he was indicted by the Grand Jury of the District Court wherein it was charged that:

> "On or about July 28th, 1922, in violation of Section 3 of the National Motor Vehicle Act of October 29th, 1919, did unlawfully, wilfully, knowingly and feloniously transport, and cause to be transported in interstate commerce,

> to wit, from the city of New York, in the State of New York, to San Francisco, in the Southern Division of the Northern District of California and into the jurisdiction of this Court, a certain motor vehicle, to wit, a Cadillac automobile, Motor No. 18664, said defendant then and there well knowing that at the time of said transportation, the said motor vehicle had been stolen."

Upon his conviction he was sentenced to be imprisoned for five years in the United States Penitentiary at Leavenworth.

There is a bill of exceptions containing the testimony and the court's charge. There was a motion for a directed verdict made and denied. There were numerous objections taken on the receipt of testimony. The charge was not objected to or excepted to except a single exception on the occasion of the return of the jury for further instructions (Tr. p. 69).

We do not here set forth a statement of the testimony; pertinent portions will be referred to in our argument.

Reference need not be made to the eighteen assignments of error made by the defendant or to the numerous objections to testimony appearing in the record; for, as we conceive it from the argument of counsel, there is but a single question in the case. That is to say, whether the proofs of the government measure up to the rule that there must be testimony tending to prove the *corpus delicti* independent of any confession of the defendant.

ARGUMENT.

I.

THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY THE CONVICTION OF THE DEFENDANT; HIS CONFESSION OF GUILT DID NOT STAND ALONE; THERE WAS SOME COROBORATION SUFFICIENT TO TEST THE TRUTH OF THE CONFESSION AND THIS COROBORATION TOUCHED THE CORPUS DELICTI.

It is not to be doubted that the defendant was guilty of transporting in interstate commerce a motor vehicle which he knew had been stolen at the time.

It is true that the most cogent evidence of guilt in the record was the defendant's statement. Upon his arrest he was interviewed by several officers. He was shown to have been in possession of the motor car described and when asked about it said, "Well, you have me and that is all there is to it". (Tr. p. 35.) He further stated that he had purchased the car in New York City in front of Brown's Auction House (Tr. p. 36). As to his method of getting to San Francisco he stated that he had gone out from New York as far as Salt Lake City and had gone from Salt Lake City to Los Angeles via one of the trails (Tr. p. 36). He said to Agent Adams in a later conversation about the car, said that he did not know it was a stolen car until a few days after he left New York (Tr. p. 56). He said he knew it was a stolen car (Tr. p. 57). He sold the car to a man named Leong at San Francisco on September 6th for $2100 and

Leong's car, a 1917 Cadillac (Tr. p. 38). He gave Leong a bill of sale for the car (Tr. p. 40) and when Leong went to the State Motor Vehicle Department to obtain a license and saw a Mr. Britt (Tr. p. 39), an official of the department, made an inspection of the car (Tr. p. 28). There was found evidence that the motor number had been altered and obliterated (Tr. p. 30) so as to indicate an impossible number for the type of car concerned (Tr. p. 30). Thereupon Britt took possession of the car and notified police detectives (Tr. p. 31). At Fourth and Townsend they found the Cadillac which Leong had sold to defendant (Tr. p. 31). Thereupon the parties went to San Jose and found the defendant, he was arrested; taken to police department and searched. He was found to be in possession of $600. When asked what became of the $2100 that had been given him by the Chinaman (Tr. p. 35) he said he owed a party $1500 and had forwarded that day and was in possession of the $600 when searched. Asked about the car abandoned at Fourth and Townsend, said, "Well, you have me and that is all there is to it". It was further shown that the car in question was on September 6, 1922, sold by defendant to a Chinese Leong, taking his car in part payment, and that he produced to Leong's attorney Ehrlich a bill of sale for the car from a man in Los Angeles whose name is Lewis (Tr. pp. 52, 53). This bill of sale was seen by witness Adams last in the possession of a Mr. Michelson, the defendant's attorney at that

time. Adams stated that it was dated at Los Angeles (Tr. p. 20), and dated the 14th of August (Tr. p. 23), and that the heading on the stationery was Lewis (Tr. p. 24). It was further shown that Adams at the time he examined it noticed the number on the motor as 18664, and that in his examination of the motor block he noticed a change or attempt to change the number (Tr. p. 26). The defendant had stated to the same witness Adams that he purchased the car in New York from a second hand auto market at Third Avenue and 18th Street (Tr. p. 18); this was on July 28th (Tr. p. 22). The defendant left New York July 29th or 30th and got to San Francisco September 6th (Tr. p. 22). The same witness said that the defendant also had a bill of sale for the car issued in Los Angeles made out by a man by the name of Lewis, some second hand auto dealer. It was further shown by the testimony of the witness Britt, who was connected with the State Motor Vehicle Department that he had been examining automobiles for ten years or thereabouts (Tr. p. 59); that the car in question was identified through a secret unit number (Tr. p. 59) which appears on all automobiles and which gives the entire history of all cars and the automobile record (Tr. p. 60) and that this number was 61 A 130 (Tr. p. 62) and that such would be sufficient to identify the car (Tr. p. 61). The same witness had said that the number appearing on the motor block *could not have been correct.* It would

not be possible for a 1922 Cadillac Sedan to have the engine number 18664.

It was further shown by production of the register of the Newhouse Hotel at Salt Lake City that the defendant registered at that Hotel on August 10, 1922, and checked out on the 12th.

Accordingly, it appears that the defendant transported the Cadillac car in question from New York by way of Salt Lake City to Los Angeles, thence to San Francisco, and he knew the car had been stolen during at least the latter portion of the trip. Such admissions would be equivalent to a confession of guilt of all of the elements of crime. The indictment charges the offense in the language of the statute and the confession would be of facts equivalent to the averments of the indictment. There can be no reasonable doubt of the defendant's guilt or of his just conviction.

The sole defense of the defendant appears to be his technical contention, having some basis in the authorities, that his confession could not be taken as sufficient proof of his guilt, unless corroborated by proof of the *corpus delicti.* Certain California cases are cited in support of his contention.

We think the true rule on the point referred to, as far as the federal courts are concerned, is to be gathered from the cases hereinafter cited and is to the effect that such a confession is sufficient to establish guilt if the jury is convinced of guilt beyond a reasonable doubt, provided there be *some*

corroboration and that this corroboration must pertain to the *corpus delicti.* The separate corroboration, however, need not be sufficient to establish the *corpus delicti* beyond a reasonable doubt, or even be a preponderance, nor need it go to all the elements of the *corpus delicti;* it is sufficient that in the respect of the *corpus delicti* it is such corroboration as tests the truth of the defendant's confession and tends to show that he told the truth.

16 *Corpus Juris,* p. 735;
"Common Law," Sec. 1514.

Thus in the case of

Daesche v. U. S., 250 Fed. 566, 571,

the Circuit Court of Appeals of the Second Circuit said:

> "It must be conceded that there has been a very general concordance of judicial opinion in the United States that some sort of corroboration of a confession is necessary to conviction, and this concordance has extended to federal courts as well as elsewhere. U. S. v. Williams, 1 Cliff. 5, 28 Fed. Cas. No. 16,707; U. S. v. Boese, (D. C.) 46 Fed. 917; U. S. v. Mayfield, (C. C.) 59 Fed. 118; Flower v. U. S., 116 Fed. 241, 53 C. C. A. 271; Naftzger v. U. S., 200 Fed. 494, 118 C. C. A. 598; Rosenfeld v. U. S., 202 Fed. 469, 120 C. C. A. 599. That the rule has in fact any substantial necessity in justice, we are much disposed to doubt, and indeed it seems never to have become rooted in England. Wigmore, Sec. 2070. But we should not feel at liberty to disregard a principle so commonly accepted, merely because it seems to us that such evils as it corrects could be much more flexibly treated by the judge at trial, and even though

we should have the support of the Supreme Court of Massachusetts in an opposite opinion. Com. v. Killion, 194 Mass. 153, 80 N. E. 222, 10 Ann. Cas. 911. We start therefore, with the assumption that some corroboration is necessary, and the questions are to what extent must it go, and how shall the jury deal with it after it has been proved. The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel. Whether it must be enough to establish the fact independently and without the confession is not quite settled. Not only does this seem to have been supposed in some cases, but that the jury must be satisfied beyond a reasonable doubt of the corpus delicti without using the confessions, before they may consider the confessions at all. Gray v. Com., 101 Pa. 380, 47 Am. Rep. 733; State v. Laliyer, 4 Minn. 368 (Gil. 277); Lambright v. State, 34 Fla. 564, 16 South 582; Pitts v. State, 43 Miss. 472. But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof. U. S. v. Williams, supra; Flower v. U. S., supra; People v. Badgley, 16 Wend. (N. Y.) 53; People v. Jachne, 103 N. Y. 182, 199, 8 N. E. 374; Ryan v. State, 100 Ala. 94, 14 South. 868; People v. Jones, 123 Cal. 65, 55 Pac. 698."

And in the case of

Rosenfeld v. U. S., 202 Fed. 469,

it was said:

"A conviction cannot be had on the extra-judicial confession of the defendant, unless corroborated by proof aliunde of the corpus delicti. Full, direct, and positive evidence, however, of the corpus delicti is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances as will, when taken in connection with the confession, establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt. Flower v. United States, 110 Fed. 241, 53 C. C. A. 271; 6 Am. & Eng. Ency. of Law, (2d Ed.) p. 582; Bines v. State, 118 Ga. 320, 45 S. E. 376, 68 L. R. A. 33."

This court has had occasion to apply the same principles in the case of

Mangum, 289 Fed. 213, 216.

In that case it is true that the case was not so close, but the court recognized the rule to be merely that there should be some corroboration and cited the same authorities referred to by Judge Hand in the case of

Daesche v. U. S., supra.

It is charged that the transportation was from the City of New York to San Francisco, California. But it is well established that it would not be necessary to prove the transportation during the whole route alleged. A portion thereof would be sufficient so long as it was from a point out of the State of California into the State of California.

Malcolm v. U. S., 256 Fed. 363.

It is thus seen that in addition to the quite pertinent confession of guilt made by the defendant the

truth of his statement was corroborated by the circumstances that he was found in possession of a Cadillac car containing a spoliated and altered engine number so that apparently the car could not have been identified from any other of the same type. It was only through the expert knowledge of an official that the true identity could be obtained, a circumstance probably not known to the defendant. The alteration of this engine number could have been made but for one purpose—to conceal the previous theft of the car. It was not necessary to show that the defendant stole the car himself or that any particular person stole it at any particular place. It need only be shown that it had the status of a stolen car at the time it was moved across the California line. The altered engine number was taken to indicate that it was such stolen car. Had defendant altered the number or even knew of the alteration would be immaterial for he admitted that he knew the car was stolen. If it was in fact stolen that element of the *corpus delicti* is established. The story of the defendant is further corroborated by independent proof that at the time he stated he was on the trip and reached Salt Lake City, he had in fact reached Salt Lake City and was sojourning there two days. There is further corroboration of his confession of his guilt in that he had made conflicting statements as to the origin of his ownership. He stated he had purchased it at New York. He was found to have possession of a bill of sale apparently issued in

Los Angeles. In the matters hereinabove quoted may be seen other independent corroborations sufficient to bring the case within the rule of the holding of the Circuit Court of Appeals for the Second Circuit in the case of *Daesche,* supra.

CONCLUSION.

In conclusion we say that upon the only substantial point discussed by plaintiff in error, to wit, that there was not sufficient corroboration of his story of guilt to authorize conviction, it is seen that there was sufficient outside evidence to test the truth of his story within the rule of the federal court cases cited, and that his conviction should be upheld.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,

Attorneys for Defendant in Error.

No. 4586

United States

Circuit Court of Appeals

For the Ninth Circuit.

OSCAR SPORGEON,

Plaintiff in Error,

vs.

ANDREW F. MAHONY, ANDREW F. MAHONY, Trustee, ROSE A. MAHONY, ROSALIE MAHONY, ROSE C. MAHONY, MARIE J. HEAPHEY, C. J. HENDRY CO., INC., GERTRUDE M. KINNEY, CARL T. LONG, MARGUERITE M. LONG, JAMES McLAUGHLIN, GERTRUDE C. McCABE, ROBERT J. LONG, EMIL KLICKA, GEORGE A. STOCK, WILLIAM ANDERSON and JOHN C. KIRKPATRICK,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed

MAY 21 1925

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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United States
Circuit Court of Appeals
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OSCAR SPORGEON,

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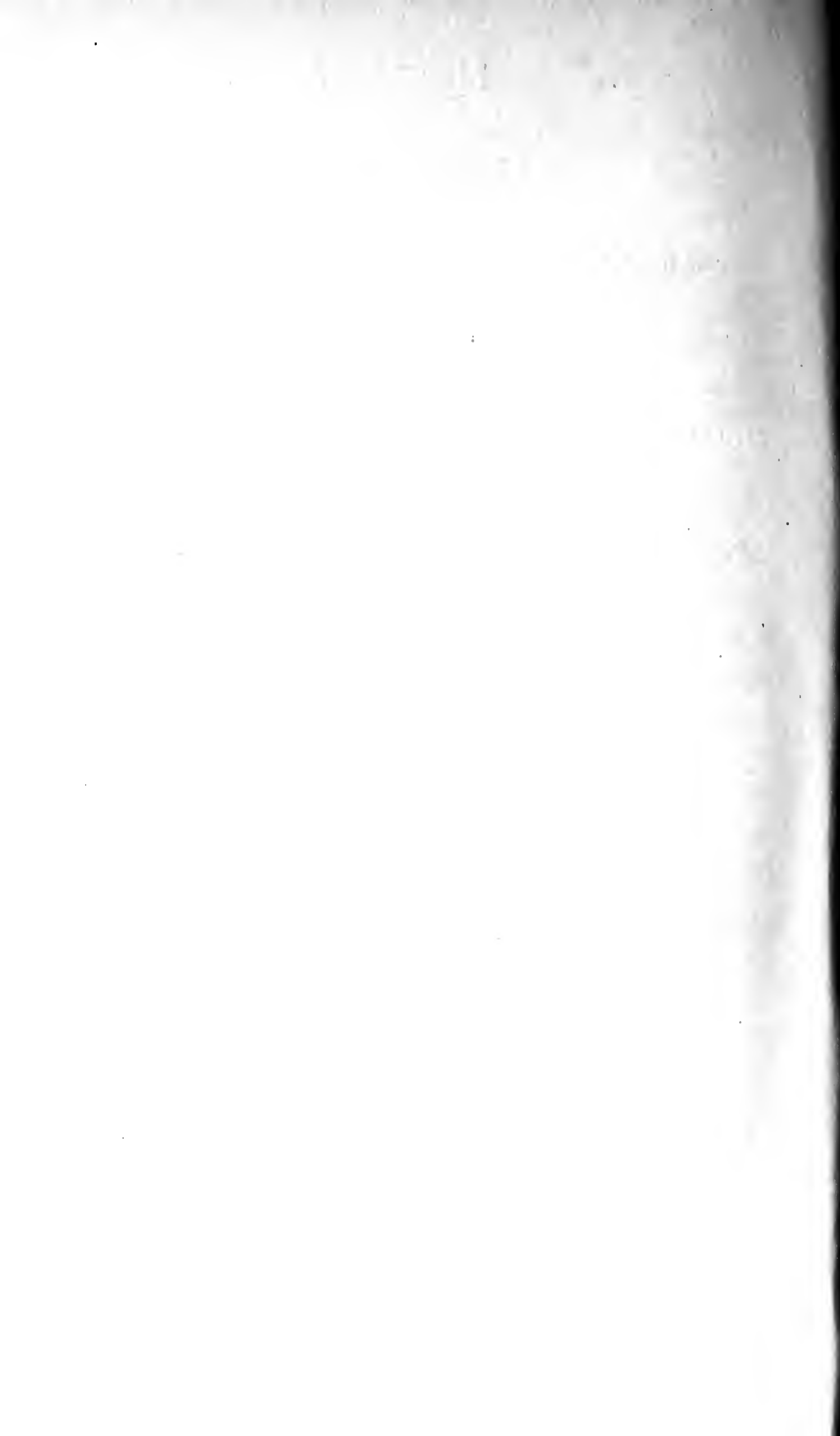

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In the District Court of the United States in and for the Northern District of California, Second Division, At Law.

No. 17168.

Complaint by Seaman Under Jones Act of June 5th, 1920.

OSCAR SPURGEON,

Plaintiff,

vs.

ANDREW F. MAHONY, ANDREW F. MAHONEY, Trustee, ROCE A. MAHONY, ROSALIE MAHONY, ROSE C. MAHONY, MARIE J. HEAPHEY, C. J. HENDRY CO. (Inc.), GERTRUDE M. KINNEY, CARL T. LONG, MARGUERITE M.

LONG, JAS. McLAUGHLIN, GERTRUDE C. McCABE, ROBERT J. LONG, EMIL KLICKA, GEO. A. STOCK, WM. ANDERSON, JOHN C. KIRKPATRICK,

Defendants.

COMPLAINT.

The plaintiff complains and for his cause of action alleges:

(1)

That the said C. J. Hendry Company is a corporation. That on or about the 14th day of August, 1924, the said plaintiff was employed on a certain Amercian vessel known as "John C. Kirpatrick," which said vessel was owned by the said defendants and was operated by the said defendant Andrew F. Mahony, as managing owner as well as part owner. That as such managing owner the said Andrew F. Mahony had full charge and control thereof with the power in him to employ all men working thereon.

(2)

That at the time of the injury hereinafter set out the said vessel was used in the carrying of lumber between California ports. [1*]

That the said Andrew F. Mahony is a resident of the city and county of San Francisco, State of California.

That the home office of the said vessel is in the city and county of San Francisco, State of California.

*Page-number appearing at foot of page of original certified Transcript of Record.

(3)

That on or about the 14th day of August, 1924, while the said plaintiff was a seaman, to wit, a second mate on the said vessel at the rate of wages of $135.00 per month and his board and room, at San Pedro, California, and while the said plaintiff was employed as a second mate on said vessel, and while he was in the performance of his duty as a second mate, and while each and all on said vessel were seamen and fellow servants of the said plaintiff, the said defendants, acting by and through the said managing owner, and by and through the officers in charge of said vessel failed and neglected to keep the said vessel and its appliances in a reasonable safe condition. That said neglect of duty is described as follows:

(4)

That it was the duty of the said defendants, and each of them, to use ordinary and reasonable care to the effect that the said plaintiff might have a reasonable safe place to work while he was employed by the said defendants in the manner aforesaid, and it was a nondelegable duty of the said defendants that they and each of them should use ordinary and reasonable care that a certain bolt, hereinafter referred to was so fastened that the same would resist an ordinary pull for which said bolt was intended.

(5)

That on or about the said date and place, while the defendants were in the act of moving certain laths on the *the* said vessel, preparatory for un-

loading of the lumber [2] on said vessel, a certain rope was fastened to said loose and dangerous bolt, and as a winchman, employed by the said defendants, used the vessel's winch for the pulling of a heavy rope fastened to a ring on said loose and dangerous bolt, the man in charge of said winch pulled out said bolt as the said bolt could not stand an ordinary strain by reason of the matters aforesaid, and while the said man, in charge of said winch, was thus pulling the said bolt was pulled loose on account of the manner in which it was fastened to the deck and on account of the rotten condition of said deck, and as it became loose the rope so fastened to the said bolt, struck the said plaintiff and fractured the spinal cord of the plaintiff. The plaintiff did not know of the said dangerous condition.

(6)

That the said negligence was and is the direct and proximate cause of the injury to the plaintiff.

(7)

That up to and including the date of the said injury the plaintiff was a strong and healthy man, earning the sum of One Hundred and Thirty Dollars per month and his board and room. That by reason of said injury the plaintiff is now confined in the Marine Hospital, San Francisco, California, and compelled to be in a plaster of paris cast.

The plaintiff alleges that the said injury is very painful, and it is very painful to be on his back in a plaster of paris cast. The said plaintiff alleges on his information and belief that the said defend-

ants in the manner aforesaid has caused the plaintiff to be a cripple for life and that he *he* cannot any more follow his occupation as a seaman. [3] He suffers mentally by reason of that he does not know if he will live or die.

That the said defendants *has* thereby damaged the said plaintiff in the sum of Fifty Thousand (50-000.00) Dollars and no part of said sum has been paid.

Wherefore the plaintiff prays judgment against the said defendants in the sum of Fifty Thousand ($50,000.00) Dollars and his costs.

S. T. HOGEVOLL,
Attorney for the Plaintiff. [4]

State of California,
City and County of San Francisco,—ss.

Oscar Spurgeon, being by me first duly sworn on his oath, deposes and says: That he is the plaintiff in the above-entitled action, that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters alleged on his information and belief, and as to those matters he believes them to be true.

OSCAR SPURGEON.

Subscribed and sworn to before me this 2d day of Sept., 1924.

[Seal] HENRY B. LISTER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sep. 3, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [5]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

AT LAW—No. 17,168.

OSCAR SPURGEON,

Plaintiff,

vs.

ANDREW F. MAHONY, ANDREW F. MAHONY, Trustee, ROSE A. MAHONY, ROSALIE MAHONY, ROSE C. MAHONY, MARIE J. HEAPHEY, C. J. HENDRY CO. (Inc.), GERTRUDE M. KINNEY, CARL T. LONG, MARGUERITE M. LONG, JAS. McLAUGHLIN, GERTRUDE C. McCABE, ROBERT J. LONG, EMIL KLICKA, GEO. A. STOCK, WM. ANDERSON, JOHN C. KIRKPATRICK,

Defendants.

ANSWER OF DEFENDANTS C. J. HENDRY COMPANY, ROBERT J. LONG, ANDREW F. MAHONY, ANDREW F. MAHONY, Trustee, ROSALIE MAHONY AND ROSE A. MAHONY.

Now come the defendants C. J. Hendry Company, Robert J. Long, Andrew F. Mahony, Andrew F.

Mahony, Trustee, Rosalie Mahony and Rosa A. Mahony and answering unto the complaint herein, admit, allege and deny as follows:

I.

Admit that C. J. Hendry Company is a corporation and that on or about the 14th day of August, 1924, the said plaintiff was employed on a certain American vessel known as the "John C. Kirkpatrick" and that said vessel was owned by the defendants named in the title of the action. Admit that Andrew F. Mahony was the managing owner as well as part owner, but deny that said Andrew F. Mahony operated said vessel or that said Andrew F. Mahony had full charge and control thereof or that he had the power in him to employ [6] all men working thereon and in this behalf allege that said Andrew F. Mahony was entrusted with the operation of said vessel as agent for himself and his co-owners and not otherwise.

II.

Answering unto the allegations of paragraph III of the complaint herein, these defendants deny that on or about the 14th day of August, 1924, or at any time while the said plaintiff was a seaman, to wit, a second mate on the said vessel, at the rate of wages of $130.00 per month and his board and room or otherwise at San Pedro or at any other place, and/or while the said plaintiff was employed as a second mate on said vessel, and/or while he was in the employment of his duty as a second mate, and/or while each and all on the said vessel were seamen and fellow-servants of the said plaintiff, the said

defendants or any of them, acting by and through the said managing owner or otherwise, and/or by and through the officers in charge of said vessel or any of them, failed and neglected or failed or neglected to keep the said vessel and/or its appliances in a reasonably safe or in a reasonably safe condition. Deny that there was any neglect of duty or that said or any neglect of duty is described in said complaint as follows, or otherwise or at all.

III.

Answering unto the allegations of paragraph V of the complaint herein, these defendants deny that on or about the said day and place or at any time or place, while the said defendants were in the act of moving certain laths on the said vessel preparatory for unloading of the lumber on said vessel or otherwise, a certain rope was fastened to the said or any loose or dangerous bolt or loose and dangerous bolt or that said or any bolt was loose or dangerous. Admit that as a winchman employed by the said [7] defendants used the vessel's winch for the pulling of a heavy rope fastened to a ring on a certain bolt, that the bolt pulled out; but deny that said bolt was loose and/or dangerous and/or that the said bolt could not stand an ordinary strain by reason of the matters aforesaid or otherwise. Admit that while the said man in charge of said winch was thus pulling the said bolt was pulled loose, but deny that it was pulled loose on account of the manner in which it was fastened to the deck and/or on account of the rotten condition of said deck and deny that said deck was in a

rotten condition or that said bolt was fastened to the deck in an improper manner; and having no information or belief upon the subject, deny that as said rope became loose it struck the said plaintiff or that it injured the spinal cord of the said plaintiff. Deny that the condition was dangerous and in this behalf allege that the condition of said bolt was open, apparent and obvious and that plaintiff had full knowledge of the condition of said bolt at the time and place alleged in the complaint.

IV.

Answering unto the allegations of paragraph VI of the complaint herein, these defendants deny that said or any negligence was and is or was or is the direct and proximate cause of the injury or any injury to the plaintiff.

V.

Answering unto the allegations of Paragraph VII of the complaint herein, these defendants allege that they have no information or belief sufficient to enable them to answer the allegations in said paragraph contained and placing their denial on that ground, deny each and every allegation in said paragraph contained, and deny further that said defendants or any of them have thereby or otherwise damaged the plaintiff in the sum of $50,000 or in any sum [8] or otherwise or at all, and admit that no part of said sum has been paid.

FURTHER ANSWERING THE ALLEGATIONS OF THE COMPLAINT HEREIN AND FOR A FIRST, AFFIRMATIVE AND FUR-

THER DEFENSE, THESE DEFENDANTS ALLEGE:

I.

That by the Act of Congress of the United States of America of June 26, 1884, entitled, "An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade," etc., Chapter 121, section 18, 23 Stat. at Large of the United States, page 57, it is provided as follows:

> "The individual liability of a shipowner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending; Provided, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners."

II.

That by the Revised Statutes of the United States, section 4289, as amended by the Act of February 18, 1875, Chapter 80, section 1, and Act of June 19, 1886, Chapter 421, section 4, it is provided:

> "The provisions of the seven preceding sections, and of section eighteen of an act entitled 'An Act to remove certain burdens on

the American merchant marine and encourage the American foreign carrying-trade, and for other purposes' approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea going vessels, and also to all vessels used on lakes or rivers, or in inland navigation, including canal-boats, barges, and lighters." [9]

III.

That at all times referred to in the complaint herein, the steamer "John C. Kirkpatrick" was and now is a seagoing American vessel.

IV.

That at all times referred to in the complaint herein, defendant C. J. Hendry Company was and now is the owner of a 24/600 interest or share in the said steamer "John C. Kirkpatrick" and no more; that said defendant Robert J. Long was and now is the owner of a 45/600 interest or share in the said steamer and no more; that defendant Andrew F. Mahony was and now is the owner of a 65/600 interest or share in said steamer and no more; that defendant Andrew F. Mahony, Trustee, was and now is the owner of a 5/600 interest or share in the said steamer and no more; that defendant Rosalie Mahony was and now is the owner of a 3/600 interest or share in the said steamer and no more; that defendant Rose A. Mahony was and now is the owner of a 66/600 share in the said steamer and no more.

V.

That if any act or acts or negligence of any person caused the injury to plaintiff herein as alleged in the complaint or otherwise or at all, the said act or acts or negligence were wholly without the privity or knowledge of these defendants or either of them.

VI.

That these defendants claim that the individual liability of each of them shall be limited to the proportion of the damage, if any, that shall have been adjudged to have been suffered by plaintiff herein, that the individual share of each of these defendants bear to the whole vessel. [10]

FURTHER ANSWERING THE ALLEGATIONS OF THE COMPLAINT HEREIN AND FOR A SECOND AFFIRMATIVE AND FURTHER DEFENSE, THESE DEFENDANTS ALLEGE:

I.

That at the time and place mentiontd in the complaint plaintiff was in charge, himself, of the movement of a load of laths from off the top of the hatch of the steamer, preparatory to discharging cargo, and that in rigging up the line used in drawing the load further aft than the vessel's gear could bring it, plaintiff carelessly and negligently caused a line to run through a certain eye-bolt fastened to the deck and then pulled away to the right and at an angle, and that by reason of the failure to use a block in connection with said eye-bolt, said bolt was subjected to an enormous and severe strain

and that solely by reason of the negligent manner in which the operation of moving the load was conducted by plaintiff as aforesaid, the bolt carried away and that if plaintiff received any injuries thereby, said injuries were due wholly and solely to plaintiff's own fault and negligence in the premises and not otherwise. That there were available plenty of blocks for plaintiff's use had he so elected to use them, but that he failed and neglected so to do although he knew or should have known that he thereby was subjecting said bolt to a strain far beyond that which it was intended to bear.

FURTHER ANSWERING THE ALLEGATIONS OF THE COMPLAINT HEREIN AND FOR A THIRD AFFIRMATIVE AND FURTHER DEFENSE, THESE DEFENDANTS ALLEGE:

I.

That at all times mentioned in said complaint, defendants and each of them used ordinary and reasonable care to provide [11] plaintiff with a reasonably safe place to work, and they and each of them exercised due diligence to ascertain that the certain bolt referred to in the complaint was so fastened that the same would resist an ordinary pull for which said bolt was intended, and that if and in so far as there was any defect in said bolt or in the manner in which the same was fastened (which these defendants deny existed) said defect was latent in character and undiscoverable by the exercise of such due diligence.

FURTHER ANSWERING THE ALLEGATIONS OF THE COMPLAINT HEREIN AND FOR A FOURTH AFFIRMATIVE AND FURTHER DEFENSE, THESE DEFENDANTS ALLEGE:

I.

That at all times herein mentioned plaintiff was an experienced, licensed officer of mature years, to wit, of the age of forty-six (46) years or thereabouts.

II.

That plaintiff was thoroughly familiar with the conditions prevailing at the time and place alleged in the complaint as to the mode of fastening the eye-bolt to the deck and the condition of other appliances on the after part of the vessel, and if there were any risks and dangers which existed in connection with the use of said appliances in addition to the risks and dangers normally incident to the occupation of a seaman which are always assumed, plaintiff voluntarily assumed all of said risks and dangers, if any, and in particular the risk and danger of being struck by a rope by a bolt pulling out in the identical manner as that described in the complaint herein or otherwise, and that by reason of the premises defendants were and are relieved from liability for any injury alleged to have been suffered by plaintiff. [12]

III.

That at the time plaintiff was injured the Steamer "John C. Kirkpatrick" was made fast to the dock at San Pedro. That plaintiff had ample oppor-

tunity to leave the vessel's service if he considered that the vessel's construction or equipment or appliances or gear or any part of same were in any respects unseaworthy or unsafe, or that the place was a dangerous one in which to work, or if plaintiff did not wish to assume the risks and dangers, if any, that existed as have been hereinbefore mentioned. That by plaintiff's said failure to leave said vessel at said time he voluntarily assumed any and all risks which existed in connection with his work on board said vessel at the time and place as alleged in the complaint.

AND FURTHER ANSWERING THE ALLEGATIONS OF THE COMPLAINT HEREIN AND FOR A FIFTH AFFIRMATIVE AND FURTHER DEFENSE, THESE DEFENDANTS ALLEGE:

I.

That if plaintiff suffered any injuries or damages as alleged in said complaint or otherwise, said injuries and damage were caused by or contributed to plaintiff's negligence in the premises, and that plaintiff failed to take ordinary or any precaution for his own safety. That particularly, but not exclusively, plaintiff was negligent in the manner in which he caused the line to be set up in moving the cargo from the hatch preparatory to discharging cargo, especially with respect to plaintiff's failure to use a block in connection with the rope running through the eye-bolt. That he was further negligent in standing in the position which he did, where he would be most liable to be struck in case the bolt

should carry away. That defendants are further informed and believe and upon such information and belief allege [13] that plaintiff was injured in other and further respects than those herein particularly set out, and that such negligence caused or contributed to plaintiff's injuries and damage, if any.

WHEREFORE defendants pray that plaintiff take nothing by his said action and that defendants be hence dismissed with their costs of suit, and that they have such other and further relief as to the Court may seem just and proper in the premises.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Attorneys for Defendants. [14]

State and Northern District of California,
City and County of San Francisco,—ss.

G. W. Hendry, being duly sworn, deposes and says that he is an officer, to wit, the president of C. J. Hendry Company, a corporation, one of the defendants in the above-entitled action, and that he is duly informed and authorized in the premises; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true; that he makes this verification on behalf of the C. J. Hendry Company for said company and the other codefendants herein; that the sources of his information are reports given

to him by his attorneys based upon interviews by said attorneys with various witnesses in the case.

G. W. HENDRY.

Subscribed and sworn to before me this 22d day fo October, 1924.

[Notarial Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

Service of the within admitted and receipt of a copy is hereby admitted this 22 day of Oct., 1924.

S. J. HOGEVOLL.

[Endorsed]: Filed Oct. 22, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [15]

(Title of Court and Cause.)

(ORDER DIRECTING VERDICT.)

Mr. Black moved the Court to direct the jury to return a verdict in favor of the defendants. After argument said motion being submitted and fully considered, it is ordered that said motion be and the same is hereby granted. [16]

(Title of Court and Cause.)

JUDGMENT.

This cause having come on regularly for trial upon the 15th day of December, 1924, being a day in the November, 1924, term of said court, before the Court

and a jury of twelve men duly impaneled and sworn to try the issues joined herein. S. T. Hogevoll, Esq., appearing as attorney for plaintiff and Harold A. Black, Esq., appearing as attorney for defendants; and the trial having been proceeded with on the 17th day of December, in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and the defendants having moved the Court to instruct the jury to return a verdict in their favor and the Court having granted said motion and the jury having returned the following verdict which was ordered recorded, namely: "We, the jury, find in favor of the defendants. John Whicher, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that defendants go hereof without day and that said defendants do have and recover of and from said plaintiff their costs herein expended taxed at $——.

Judgment entered December 17, 1924.

WALTER B. MALING,
Clerk. [17]

In the District Court of the United States in and for the Northern District of California, Southern Division, at Law.

OSCAR SPORGEON,

Plaintiff,

vs.

ANDREW MAHONEY et al.,

Defendants.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial in the above-entitled court before the Honorable George M. Bourquin, Judge, on the 17th day of December, 1924, and that a jury was duly impaneled and sworn to try the case; S. T. Hogevoll, Esq., appearing at attorney for plaintiff, and Harold A. Black, Esq., representing Farnham P. Griffiths, Esq., and Messrs. McCutchen, Olney, Mannon & Greene, appearing as attorneys for defendants; whereupon the following witnesses were sworn and the following evidence was given, and no other evidence was given, and the following exceptions taken and allowed:

The COURT.—In the matter of the plea in the answer, limitation of liability, the Court is of the opinion that counsel may present his proofs, and it will be a matter for the jury to determine. I find nothing in the Jones Act which deprives the ship owner of the benefit of such defense. There are cases in the United States Supreme Court that sanc-

tion it being tried in an action of this sort. I think, however, it is largely a question for the Court. As I observe, however, the plea on the part of the defendant goes only to the extent of ownership. There is nothing about value?

Mr. BLACK.—No, your Honor.

The COURT.—Very well. It ought to be a simple matter of [18] proof, and, of course, the matter of privity or knowledge of the ship owner.

DEPOSITION OF HOLGER MARSK LAURITZEN, FOR PLAINTIFF.

The deposition of HOLGER MARSK LAURITZEN, a witness called by defendants, was introduced by the plaintiff, which deposition is as follows, sworn.

Direct Examination by Mr. BLACK.

My name is Holger Marsk Lauritzen; I am now winch-driver on the "John C. Kirkpatrick," and I was such on the vessel in August, 1924, when Oscar Sporgeon was injured. He was then second mate. I remember the accident. They were picking up a load from the hatch, No. 3, and he had a lead rope leading through the ring-bolt and out from the lead to the windlass, and they were heaving away aft; and the ring-bolt carried away; and Sporgeon was standing in the bight of it and got knocked up against the bitt. By "bight" I mean the angle in the rope. The rope led from the load. The lead was neither to right nor left, it was in straight line with the ring-bolt. The angle was on the starboard

(Deposition of Holger Marsk Lauritzen.)
side of the poop, right out through the lead. It was to the right from me. I was standing aft and looking forward. The line ran straight back from the load through the ring-bolt to the poop-deck and carried away to the right. It then went to the lead and then to the windlass. Sporgeon was standing just in the bight, or between the ring-bolt and the lead, in the angle of the rope. When the bolt pulled out it straightened out and he got swung out against the bitt. He did not use any block, the rope went straight through the ring-bolt. The second mate had charge of the work on the after deck; I do not know where the first mate was, the first mate was looking after both ends; he had charge of the whole thing, and the second mate had charge of this particular operation. I [19] do not know if I have ever seen an eye-bolt used like this one was used; I suppose it was used to get the best lead aft. I saw the bolt after it was pulled out, it was about six inches long. It was similar to the bolt later offered in evidence at the trial as Defendants' Exhibit 1. The bolt showed no breaks in it, it was pulled straight out of the deck. After the accident Sporgeon went with the vessel to San Francisco, and I guess he took his watch. I didn't think at the time that the injury was going to be serious. It was necessary to move the load, as they had to get the lumber out of the hatch and to do this, some laths on top of the hatches had to be moved. The load was about level with the poop-deck, they had quite a few loads already landed on the deck. The line which was pul-

(Deposition of Holger Marsk Lauritzen.)
ling the load was attached to the top of the load. The load was four or five feet high and about level with the poop-deck—the top of it. I was running the winches, and the load was held up by the falls, and was clear of the deck, and was clear of the rest of the load. I was slacking away until it got to the right place for landing.

Cross-examination by Mr. HOGEVOLL.

Q. You say you were the winch-driver?

A. Yes, sir.

Q. And you saw when this particular load was fastened? A. Yes, sir.

Q. You saw it when you began to pull it?

A. Yes, sir.

Q. There wasn't anything unusual there this time to other times, was there? A. Not that I know of.

Q. If this load had been fastened the same as the other loads you would have known it, would you not?

A. Yes.

Q. Sure?

A. Sure; it was the first load I picked up.

Q. You have been a winch-driver many, many times, haven't you? A. Yes, sir. [20]

Q. For several years? A. Yes, sir.

Q. And saw them use this particular bolt in many places the same as it was used that time; it was nothing unusual?

A. They usually lead it the way it will lead best.

Q. They usually lead it the way it will lead best, and do not stop to make an inquiry, Mr. Lauritzen,

(Deposition of Holger Marsk Lauritzen.)
if the ring-bolt is fastened enough; they take it for granted it is solid enough? A. Yes, sir.

Q. And at this time, fastened the way it was, you took it for granted it was like any other bolt on the ship? A. Yes, sir.

Q. And if it hadn't been the same way, the way it was generally done by other companies' ships, you would have known it, becase you have been a winch-driver for many years? A. I guess so.

One of the longshoremen fastened the rope to the load, and when they said, "Go ahead," I started to pull, and it came out, and I did not pull any different from other times, and if the bolt had been as an ordinary strong bolt would be, it would have held.

I do not know the name of any other person around at that time. The ship was built in 1917. I saw no rotten condition of the ship in the hole where the bolt came out. I did not look for it, as I did not think that there would come anything out of it. I picked up the bolt and looked at it. I saw the wood in the grooves of the bolt. It did not seem to be fresh material, you cannot expect it to be exactly like new, because the water is bound to seep in and weaken it from 1917 to 1924, seven years.

Redirect Examination by Mr. BLACK.

Q. You never saw a bolt used like this before this time for that purpose, did you?

A. I could not say exactly that I have because I never,—I could not say that, not a bolt like that. There are so many different kinds of bolts on a ship. [21]

(Deposition of Holger Marsk Lauritzen.)

I don't remember seeing one used like that for that purpose before.

Q. That is what I mean,—for that purpose. And, Mr. Lauritzen, you do not know definitely, do you, the condition of that wood around that bolt; you did not look to see it, did you?

A. No, but I know (I could not swear) but I remember I took up the bolt and said, "No wonder it pulled out," because I thought it was rather small. I thought it was rather small for the use to which it was put.

Defendants' Exhibit 1, a ring-bolt, was thereupon introduced in evidence.

TESTIMONY OF DR. ROBERT JONES, FOR PLAINTIFF.

Dr. ROBERT JONES, a witness called on behalf of the plaintiff, testified as follows (witness sworn).

Direct Examination.

I am a surgeon in the Public Health Service in the Marine Hospital, San Francisco. Sporgeon came to the hospital August 18, 1924, where he is still. I have an X-ray plate taken the day or about the time he came to the hospital. The reading shows a fracture of the transverse processes of the left second, third, and fourth lumbar vertebrae, and the fracture lines run through there (indicating), and they are comminuted fractures through there. That means they are crushed out; that is,

(Testimony of Dr. Robert Jones.)
they are divided into several fragments. You see them, one, two, three, on the left side. It is a public record, we want them (the plates) back. On clinical examination we found that the muscles on the left side of the lumbar region were rigid, were spastic, were held rigid. He is at present in a plaster of paris jacket. I cannot tell if his condition is permanent. I do not think it will be a matter of years until he can find work, or that he will be permanently disabled, but I cannot tell. Sporgeon is forty-seven years old. I expect [22] to keep him in that plaster cast about six weeks more. He is up and around now.

Cross-examination by Mr. BLACK.

The transverse processes of the lumbar vertebrae are the bony processes which run out from the side of the vertebrae, and they are for attachments of muscles and ligaments. The injury has not affected the spinal cord, proper, nor has it broken the backbone, proper. It is just a little bony process that projects out of the side that has been chipped off. I have taken no X-ray picture of this patient since his first admission to the hospital. Whether there has been a union of the broken fragments would be demonstrable only by another X-ray. From the time of the accident in such cases a man should be able to work in three months. I do not know if this case is different from a normal case. I see no indication in this case of permanent in-

(Testimony of Oscar Sporgeon.)

jury. These bones that were broken are not the circular part of the backbone.

The X-ray plate was left in court as an exhibit.

TESTIMONY OF OSCAR SPORGEON, FOR PLAINTIFF.

OSCAR SPORGEON, the plaintiff, testified as follows (sworn).

I am the plaintiff. On August 14th, 1924, I was in San Pedro, California, I was second mate on the "John C. Kirkpatrick." I have been a mariner for thirty years. I am now forty-seven. I was first a seaman, ordinary seaman, on the Revenue Cutter "Bear," then next on the battleship "Oregon" during the Spanish-American war, then next revenue cutter service, next an officer on merchant ships, and during the world war a lieutenant, senior, in the United States Navy, and then officer and master of merchant ships since 1919. That is all I have done. During the four or five last years I have made on an average somewhere around twenty-five hundred dollars a year. On this particular day we were busy discharging [23] lumber, and about eleven o'clock in the morning on my end of the ship, the chief officer, Ole Grande, came to me and said, "Well, this afternoon, Mr. Sporgeon, you will have the longshoremen remove the laths from the hatch aft and amidships." We had about three carloads of laths, covering fore and aft midships of the hatch. These had to be

(Testimony of Oscar Sporgeon.)

moved in order to get about twelve thousand feet of lumber out in the morning in another place, while the men were there. When I got the order, it looked peculiar to me, because the middle was over the head, nearly level with the poop-deck, and both sides of the deck were empty. It is impolite for a junior officer to ask reasons of the senior officer, or why, so I said, "All right, sir." I walked aft and looked the situation over. I looked for what manner, or means, or ways they would have to get the laths out. I looked around there. The ropes that they used to pull the laths out did not look any too good to me. In fact they were old lines, three and a half inch lines, having been used for boom lifts before, and they looked pretty well faded to me, and I looked around for the leads to the winch. I haven't been in such a ship; I have been in a good many ships; I have never seen anything like it. She was one of those war-time-built vessels, and the winch—if you would understand, sir, what it means to be level with the keel, the winch on the particular ship was level with the keel, turning fore and aft, and to get down to that kind of winch you must have a way to lead a rope to that winch. I looked around, saw two ring-bolts on either side of the winch.

Q. The ring-bolt that you saw, is that something like this one?

A. Exactly, sir, something like that.

Q. Exactly?

A. Yes, sir. In fact they used those ring-bolts

(Testimony of Oscar Sporgeon.)

loading. I was busy, and I walked aft again; the chief [24] officer and third officer were aft using them particular ring-bolts loading the ship. We had only our own crew working, no stevedores. We were using them—

Q. Just a minute. Do we understand you to say that the ring-bolt that you now mentioned was used in the same way as you had used it by everybody on the ship?

A. Yes, sir; but when I looked them over, the ring-bolt looked all right to me, but the ropes didn't look all right. Therefore I wanted a block, because if you go to work and have a poor looking line, and you have to reeve it through an iron ring, the rope is going to break, because it will naturally wear out. I looked around the ship, and I had the order to remove those laths. I looked around for what you call a snatch block or a leading block. It is a block—you can trip it any time you want to.

Q. They also call it a snatch-block?

A. Yes, sir, that is the proper name for it. After twelve o'clock I went to Mr. Grande and I said, "Are there any snatch-blocks on the ship? I can't find any." He said he would be blessed if he knowed; he hadn't seen any. He said, "You might as well go forward to the store-room and see if there is any." I walked forward a little after one o'clock; I had the longshoremen piling up the laths, ready. I walked forward and looked around; I couldn't find any. When I came out of the store-room, there was a sailorman there that had been for

(Testimony of Oscar Sporgeon.)

some time on the ship. I walked toward him and said, "Have you seen any blocks on the ship?" He said, "I haven't. What are you going to do with them?" I said, "We have to move those laths out, and we have to have something for rope to lead out." He said, "Oh, we never use them. We have been getting along without them." All right. I went out and said, "Now, men, I don't like these ropes. Build small loads." Well, I was [25] doing famously well. Everything was nice and smooth. But there was one particular place on the ship, right near the forward part of the winch, within one foot of that winch. There was a great big 24x24 Sampson post, and it was a very peculiar thing to have a lot of laths in there. Like the winch would be right here and there was a place, I should say about ten feet between that point and the winch, right in front of the machinery, and the machinery revolved around this way, and the load had to come this way, you see. Now that particular ring-bolt was just there, and to get that load there—I looked over and decided I would let this place out, because there was plenty of room at the side of those laths. It was not necessary to go to work—it would waste time and a lot of trouble to get that load in there, and I commenced to place that load, the next load, and the stack I had already planned, told the longshoremen to pile the laths to the side. When the chief officer stepped around—he didn't say anything to me—

Q. That is Mr. Grande?

(Testimony of Oscar Sporgeon.)

A. Yes, sir. He said to the stevedores, "Why do you put in those laths on the side for?" "Oh, that was Mr. Sporgeon's orders." "Well," he said, "why are you putting them there for?" I said, "Mr. Grande, you have plenty of room on the side, and to place those laths there, it is very awkward." He said—he didn't speak directly to me, but there was a load already built, and he said, "Put that load right there, in the forward part of that winch, in that hole." I didn't say a word to the chief mate when he gave that order. I was standing over on the ship's deck. I looked up to the winch-driver; he was facing aft, and I said, "Charley, that load goes over there." The load was going aft then. A man was at the winch, heaving off, and I kind of looking around following the load as it went. When [26] she was nearly there, the man couldn't reach the lever of the steamer himself. He wasn't aware of what to do, but it is one of those levers that you have to shove and pull. I went by the load and reached the lever to shut the steam off. When I did that, that's all I remember for a while. I picked myself up across the bitts. When I came to, the winch-driver had stopped the operation of the winch and just dropped the load where it was, and I went aft to see what had happened. There I saw the bolt. That bolt pulled right clean out of the deck, and was laying still on the deck there.

Q. What was the difference in this particular bolt and other bolts that you have seen on ships

(Testimony of Oscar Sporgeon.)

used for that particular purpose? What is the difference in the fastening?

A. The difference in fastening—seamen, sir, do not use that kind of bolts on a ship for any purpose whatsoever, for heaving or lashing or holding, because that bolt is unsafe to be on board of a ship. I have seen this kind of bolt in my experience for life-boat lashing. You know, life-boats are secured on decks, and they have what you call gripes to hold the boat down. I have seen this kind of bolts put in these screw-eye bolts, I would call them with a ring like that, of a smaller size, and by the ship rolling and moving and shaking they won't hold. They come out. In fact I was some years ago in the steamer "Charles Christenson," and we lost our life-boats in a southwesterly swell just on account of a bolt like that. The bolts that are used for that purpose have no threads whatever. It is a straight bolt. The Lloyd insurance calls for a straight bolt, running through the wood on the beam, with a square iron a quarter on an inch plate, and the bolt must be crimped back. So there is no way of shaking or working out. That is the proper way for a bolt to be fastened on board a ship. [27] I know what a nut and a washer is and there was no such thing on this bolt. The bolt was something like this one (indicating the exhibit). It was a three-quarter inch bolt. A nut would not be any good on that bolt.

I can't see quite as good as before the accident. I have now been in the hospital four months, and

(Testimony of Oscar Sporgeon.)

I am wearing a plaster cast. I had good health before the accident, and was never sick a day. I limped around for a while the day I got hurt, but I found that I couldn't lay down or sit up. The angle where the load was, was about forty degrees.

The COURT.—Tell us about how far from the winch.

A. The angle was about the distance, the length of the distance between that bolt and that particular angle was almost fifteen feet. The angle was between thirty and forty-five degrees.

As the winch pulled up the load I was struck when I went over to shut the steam off the winch. The load was a very light load, having about twenty-five bundles of laths, and a bundle of laths weighs about forty pounds in the summer time, that is the average weight. That would make a thousand pounds. Very slight load for a steamer. I do not know, if the bolt was pulled out sidewise or not, but when I looked I saw no breakage of wood whatever in the plank there, but just sufficient wood—I am referring to along the bolt, the wood that was there had not even a splinter there. It was just like it slid out easy. Where the bolt was, was a place that would expose it to the elements, and especially to fresh water running out of the winch.

Cross-examination by Mr. BLACK.

Mr. BLACK.—Mr. Sporgeon, I doubt if the jury has a very clear conception of just what happened in this case, and with your permission I will draw

(Testimony of Oscar Sporgeon.)

a rough plan and you correct me if it is not [28] substantially correct.

Mr. HOGEVOLL.—Will you be so good as to put it closer where he can see.

The COURT.—Proceed, Counsel.

Q. Now, Mr. Sporgeon, assuming this is the rear end of the ship, your poop-deck breaks off about there? A. Yes, that is all right.

Q. That is so far. The hatch is about here, is that correct? A. Yes.

Q. Now, your two spools on your winch are located running in a line with the keel? A. Yes.

Q. Your winch is located here? A. Yes.

Q. Now, the ring-bolt was located immediately to the starboard side of that winch, was it?

A. Show it further down; put it about two feet further down, lower down.

Q. Your load was about the center of the square of the hatch? A. About that.

Q. It was a load of laths, almost a square load, wasn't it?

A. Well, laths don't come aboard in square loads, they come in a sling.

Q. That is more approximately, isn't that so? Now, your booms were out on an angle over the load?

A. Yes, one boom is generally trimmed looking to the wharf, and one for the ship.

Q. And the load was suspended in the fall of the boom? A. Yes.

Q. You hooked on your line, on top of the load?

(Testimony of Oscar Sporgeon.)

A. On top of the load, that's the upper part of the sling, that's where the line is.

Q. You ran the line through this ring-bolt?

A. Yes, [29] sir.

Q. Now, over here is a boom-rest, isn't that correct?

A. Yes, but by the boom-rest is another ring-bolt, two ring-bolts on each side.

Q. There is a ring-bolt there?

A. Yes, there is a ring-bolt there, too.

Q. This is a piece of square timber, on which your boom is, when the boom is shipped, it rests on this block? A. Yes, that's where she lays.

Q. Now, over here, Mr. Sporgeon, is your rolling chock, isn't that correct? A. Further out.

Q. Like this? A. Near it, yes.

Q. Over here?

A. Yes, that's about where that will be.

Q. Then your line ran through—

A. (Interrupting.) Here, cast around there, around the—

Q. (Interrupting.) And thence around the drum? A. Yes.

Q. And while in the process of heaving this lead back, this ring-bolt carried away, as you were standing there?

A. Yes, close to the rope, to get hold of this lever.

Q. And the rope probably threw you against the boom rest?

A. No, further on there is a set of bitts, to make the line fast.

(Testimony of Oscar Sporgeon.)

Q. The bitts are about two feet high? A. No.

Q. There is one set of bitts—

A. (Interrupting.) No, a set of bitts alongside the winch.

The COURT.—I couldn't say whether a difference of an inch or a foot is going to cut any particular difference.

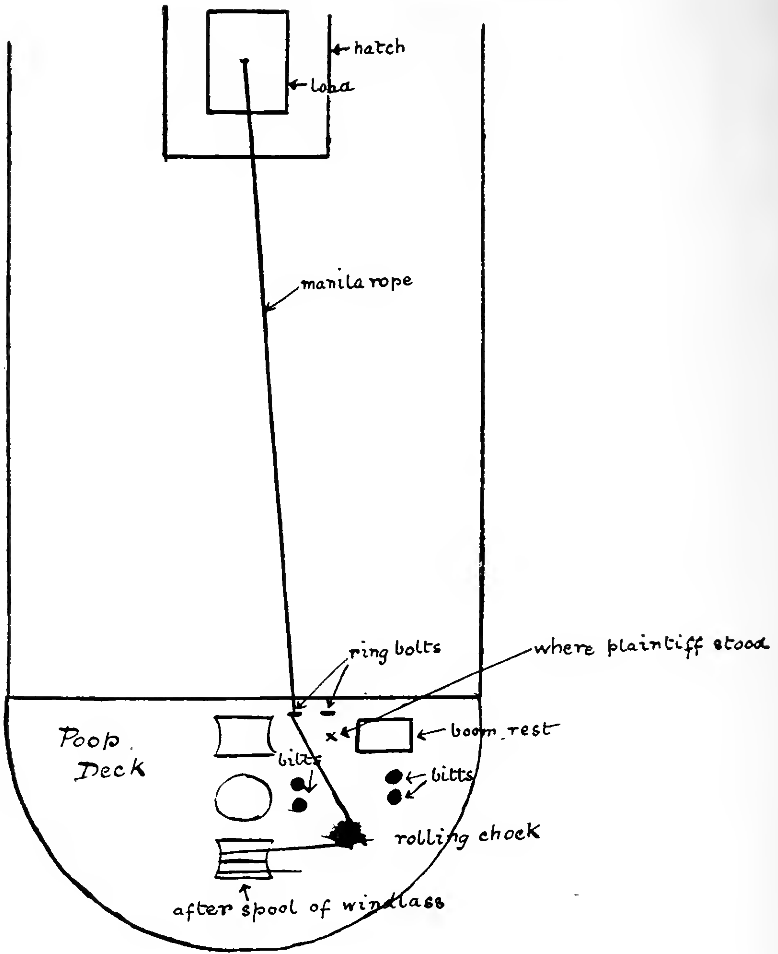
Mr. BLACK.—It may become materially important later.

The COURT.—I doubt it. Proceed briefly.

Mr. BLACK.—Q. Where are the other bitts?

A. Just about where your chalk is.

Q. About there? A. Yes, sir. [30]



Rough Sketch of
Stmr. "John C Kirkpatrick"

Showing parts of vessel discussed at the trial.

(Not is scale)

Sporgeon v. Mahony et al.

(Testimony of Oscar Sporgeon.)

Q. It was across these bitts that you were thrown, when the line carried away? A. Yes, sir.

(A copy of said sketch is here attached for convenience of reference.)

I was in charge of the operations. I looked for a snatch-block first under the poop-deck, there is a store-room there, there is a locker where they keep the tools. I did not find any there. I asked a man, a sailor, if he hadn't seen any. The chief officer told me that he didn't know that there was any on board the ship or not.

Q. This ring-bolt is screwed right into the deck, isn't it?

A. I do not know that. If I had known that, I never would have put a rope through, a rope or a block.

I did not take any notice, if there was a metal plate where this bolt was screwed into the deck. I am not sure, if there was a metal plate, because I did not look for any, because any makes of ring-bolt are all right; when you are working around machinery, all bolts are supposed to be all right. I did not look for any metal plate as it was not my duty to reeve any line. I am not a sailor and do not perform that work, but it was my duty to change any equipment that I thought was not properly rigged up. I would give instructions that it should be done the other way, if it is in my line of duty, or it is possible for me to do so.

I have been going to sea for thirty-one years.

(Testimony of Oscar Sporgeon.)

We had carried about a dozen loads of laths before the accident but not when this bolt was used; we had reeved through the other bolt first. When the accident happened, it was the first time we used that bolt. By other bolt, I mean other ring-bolt, that was of the same construction. We changed to this one because we had to be closer in, in order to get the load in this particular [32] place.

Q. Now, couldn't you direct the disposition of this load in a 'thwartships direction by the use of the falls?

A. No, sir, because the falls were trimmed towards the center of the hatch; they were not trimmed towards that hole the mate said to put it in, and it does not pay to swing the cargo booms to put it in that hole where he wanted it. We had to do it with the lines. It would be possible to run a line from the bitts on this side (indicating) with a snatch-block, if we were to go to a lot of time, but it would take from 15 to 30 minutes to rig it up, and it does not pay to do that for one load, and if I had known that the chief officer wanted that load in there I would have taken the trouble to rig that particular thing up, but he said, "You people are too slow. Put that load in there." We had no time to rig up anything. I could have taken that load out, if I had taken time, by myself.

By running this line through this bolt, I was subjecting the rope to quite a lot of wear, and if the rope carried away, it would have hurt the men back of the hatch. I nevertheless ran it through, be-

(Testimony of Oscar Sporgeon.)

cause I could not find any block, and I warned the men not to build big loads for that reason. I have never seen that kind of ring-bolts used screwed down there, the only place where I have seen them is on ship's forecastle heads. On this kind of wooden schooners, they have wooden gratings made; when they go out to sea they carry their mooring lines under that grating, and they put in a couple of bolts of a smaller size than that, just to lash those mooring lines down, so that they wouldn't jump overboard, and that is the only place I have seen those bolts used, and if it is necessary they use them for lashing down booms, and I have not seen them used for line stoppers, not that kind of [33] bolt, that wouldn't hold.

The heavy rolling chock is built right into the ship, it was properly secured in good working order, and so solid that you would have to pull out the deck in order to pull it out. I do not know if the bitts were of wood or steel, but they were fastened to the ship, of good solid construction.

A longshoreman was at that time operating the windlass, or capstan. The cargo winch is about amidships. The winch-driver was slacking away and pays out while the other man takes in the slack. A stevedore took the rope around the gipsy head of the winch, and he was holding on to it as the winch was swinging around. He was aft, at the drum head. I was standing on this side close to the ring-bolt when this load was pulled.

(Testimony of Oscar Sporgeon.)

I first went to the hospital on the 18th of August, at 5 P. M. There they cleaned my system, they strapped my back and put supports on both sides of me. I stood the bridge watch going up from San Pedro to San Francisco for the reason that I could not lay in my bunk, and I could not sit down.

(Witness excused.)

TESTIMONY OF FRANK H. AINSWORTH, FOR PLAINTIFF.

FRANK H. AINSWORTH, a witness called by the plaintiff, testified as follows (sworn).

Direct Examination.

I am a captain, and I am now employed by the United States Veterans Bureau. I have had a chance to observe the way they put in ring-bolts in ships. The ring-bolt, Defendants' Exhibit No. 1, is what they call a ring-bolt with a lag screw, and it is used for various purposes on ships, to secure articles. One could not tell by looking at it, except from below, if this bolt was clinched under deck. If a person sees a bolt of that size on the deck, they would use it for the purpose for which it would be [34] necessary to use a bolt of that size. There are several methods used in order to make a bolt solid so it will not come out or work loose, one by riveting it over a washer, one by putting a nut over a washer and one by putting a key through it, over a washer. That would make a good solid method. I imagine the wood around such a bolt used for six or seven years would become soft. If hit by lumber

(Testimony of Frank H. Ainsworth.)

from time to time it would tend to loosen it, and when loosened it would tend to come out. If a rope is put through it this would have a tendency to pull the bolt in the direction of the strain. This would have no effect on the threads but it would make it loose.

The COURT.—There is no evidence of the bolt having been hit by lumber, and if the testimony is not connected up, it will be stricken out.

Cross-examination by Mr. BLACK.

I have seen bolts of this kind used for lashing booms, very frequently, it is common construction. The bolt is quite satisfactory for lashing cargo or booms to the deck. No bolts are put in for the purpose of running lines through it. I have seen them used with snatch-blocks without a plate. If you have a snatch-block any bolt may be used. Bolts used for that purpose are usually secured underneath. Very seldom there is any square plate, or a large plate, on the deck around such a bolt; there is sometimes a little collar, or a little washer, an inch and a half or two inches from the bolt to the outside of the washer. It is a common practice, but not good practice to run a line through a ring-bolt of this kind. It is not good practice because it tends to wear the haul and make heavier heaving.

Q. Wouldn't any experienced licensed man be expected to know that by using a bolt in that method he was subjecting both [35] the rope and the bolt itself to a larger strain than it was intended to bear?

A. He would know the degree of the angle of the lead. If it was a slight angle it wouldn't be so much difference. If it was an acute angle, it would be very difficult. I would deem the angle that the plaintiff had to draw in this case an obtuse angle, more than 90 degrees, according to your diagram. It is a long way from a straight pull, however. The angle is about 120 degrees, I should judge. The strain would depend upon the load entirely, but more force would be exerted on the ring-bolt than would be the case with a straight pull.

(Witness excused.)

TESTIMONY OF JOHN JOSEPH MORIARITY, FOR PLAINTIFF.

JOHN JOSEPH MORIARITY, a witness called on the part of the plaintiff, testified as follows (sworn).

Direct Examination.

I am a marine and stationery engineer, and have been such since 1882. I have had occasion to observe how bolts are put on the decks of ships. A bolt with a surface like that is merely screwed in. It is a galvanized lag screw. A man on the deck cannot tell how it is fastened below. There are several ways to fasten such a bolt, some have a shoulder, and you screw them in, underneath they sometimes put a washer or a grummet to prevent leakage. Evidently there was no washer on that bolt. The very fact that it has a conical screw on it shows that it was merely intended to be screwed

(Testimony of John Joseph Moriarity.)

in. I cannot say if this would be a safe way of screwing in the bolt. A strain might be horizontal or vertical and it might be a compound strain. It it had been used on any previous occasion there would be a tendency to loosen the threads which are very small. I cannot understand at all that [36] that was used for any strain. A bolt like that, if the deck is wet, with such awful small threads wouldn't have any hold at all, but this cannot be told from the way it was screwed in. Judging from the size of it I would moor the courtroom to it. Judging from the size of it, it would stand an awful strain, that is a 7/8, I think.

Cross-examination by Mr. BLACK.

I am not a captain, but I rate as an army captain just the same. I have seen bolts of this kind used to lash down booms with on deck. I do not know if there is any indication from the way it is constructed to show that it was not intended to have lines through it. If it was available for that—time is a factor on this class of vessels, and you make it fast to anything. You certainly would—

Q. If you had a load of lumber to forward and had to move it back, you wouldn't put it on to anything you found laying around there?

A. If I didn't have a block, I would have to do the next best thing, and even with a block with that it wouldn't be much different, any more than the friction of a rope.

Q. Wouldn't the elimination or flattening out of

that angle by the use of a snatch-block tend to reduce the strain also?

A. There is an iron hook on a snatch-block, that would tend to loosen the screw at least.

The COURT.—The jury can see that a hook would tend to flatten out the angle and this would tend to reduce the strain.

The WITNESS.—I would not consider it good seamanship to use a bolt without using a block.

(Witness excused.)

DEPOSITION OF D. McFADDEN, FOR PLAINTIFF.

The deposition of D. McFADDEN, a witness for the plaintiff, being thereupon introduced in evidence, [37] which was as follows (the witness was sworn).

Direct Examination by Mr. BEUM.

My name is D. McFadden; I am a stevedore by occupation. On August 14th, 1924, on the date of the accident, I was on the "John C. Kirkpatrick." We were discharging lumber. The second mate superintended the job. We were then removing laths from the wing to midships, so we could get the lumber that was underneath the laths. We moved it to amidships. These loads were slung up and picked up by the ship's gear, and there was a rope with a hook, hooked on to the ship's gear back through a ring, around the bitt to the winch or capstan. These falls come together and there is a chain of about three inches that is hooked on to

(Deposition of D. McFadden.)

the end of the load. The falls are attached to the winches, they run to the hook and pick up the load. The line of the rope that was used to pull back the laths is running through the deck ring and around the bitt to the capstan. Two sailors were operating the gear at the time. I saw Sporgeon standing right there near the boom rest. When the accident happened we had been working a half an hour in moving laths. He was injured this way: This load was at about the after hatch. When this ring-bolt pulled out of the deck it compelled this rope to come into a straight line. There was about a three-foot turn from the ring-bolt to the bitt, and the second mate was hit and thrown against the boom rest. When the ring-bolt was pulled out, the line straightened and naturally hit the second mate, knocking him against the boom rest. The load weighed approximately fifteen hundred pounds. The load was attached to the rope leading to the capstan and it was attached to the ship's gear. The winch-driver held the load in that position. At the capstan were two sailors; they were the means of getting the load back with the capstan. They were pulling on the [38] loading line with the capstan. I saw the bolt after it was pulled out, immediately after the accident, it was a lag screw, four to six inches long. It was jerked out and had been fastened to the deck. When plaintiff was struck, he rolled against the rail of the ship, but picked himself up and continued working the rest of the day. In the meantime the first mate had

(Deposition of D. McFadden.)

come around, and cursed and swore the second mate because the lumber was not coming fast enough.

Cross-examination by Mr. BLACK.

The companion way is clear of the capstan, well over to the starboard side of the vessel. I am *position* that the ring-bolt is not practically in front of the capstan. It is possible with a load with the gear in this position that I have described to bring a load practically amidships. The winch-driver has full control of the load by letting the starboard fall and slack away on the starboard fall and take up on your part it is bound to go over, it has got to, the rope can't hold it. The ring-bolt was about half way from the midships to the starboard side, about that I am positive. I am not positive how far the ring-bolt was from the capstan. There are two sets of bitts but not of the same construction. I am positive that there was no lead with a rolling part in it. Where the rope goes around to the capstan there are two straight immovable bitts. I am sure that the rope went around the bitts and not around the leads or chock with a rolling part. I was standing on the level of the poop-deck. There were no snatch-blocks used in connection with this ring-bolt. Two sailors were in charge and they were taking orders from the second mate. The screw was not rusty. The load of laths contained approximately forty bundles of laths; it was about six feet high and five feet wide, and about four feet long. [39]

(Deposition of D. McFadden.)

Redirect Examination by Mr. BEUM.

I do not know of my own knowledge who rigged that gear.

(Witness excused.)

DEPOSITION OF ANDREW AEZER, FOR PLAINTIFF.

The deposition of ANDREW AEZER, a witness called on behalf of the plaintiff, was introduced by plaintiff, which testimony is as follows (witness sworn).

Direct Examination by Mr. BEUM.

My name is Andrew Aezer; I live at 383 Ninth Street, San Pedro. I am a shipwright, and have been working in this harbor (San Pedro) for the last four years. I was called to work on the "John C. Kirkpatrick" some time in August, 1924. I was called to do joiner work in the pilot-house. A ring-bolt was pulled out and they told me to fix it. The second mate who was hurt gave it to me. He said the ring-bolt pulled out and hit him in the back. I saw the bolt, it was a seven-eigths by seven inches long ring-bolt. It was a lag-bolt without any nut on the end; I lengthened it from seven to seventeen inches and put a nut on the end and put it back in the hole. This lag-bolt would stand a strain of two tons, that is, if there was a weight of two tons hanging on the falls it would hold that. If the winchman is pulling against this load which is attached to the fall that would not increase the strain on the ring-bolt. That ring-bolt will stand two tons,

(Deposition of Andrew Aezer.)
where a bolt is run through the deck and through the beam with a nut on it, it would stand a greater strain, even one ton more.

Cross-examination by Mr. BLACK.

Of my own knowledge, I do not know how this bolt was used. A lag-bolt is a bolt that merely screws on the deck. This bolt was galvanized, and not rusty. I spliced the bolt and made it seventeen inches long. I never saw the captain, only the mate who gave [40] me the ring-bolt. I have often been on the "John C. Kirkpatrick." The ring-bolt was about eight feet from the center of the vessel to the starboard side. The beam of the ship was approximately twelve by twelve (12 by 12). The width of the vessel was about thirty-eight feet deep. I am sure that the ring-bolt was located not more than six feet from the capstan. The gypsy or capstan is about the center of the ship. I did notice the hole where the ring-bolt had pulled out, but I did not notice if it had been pulled out in a sidewise direction. The wood did not indicate that it had been torn, and it was perfectly sound and there was no indication of rottenness. The bolt is screwed into the deck and there is no chance of any leakage, and no water could get in down over that screw. I see that kind of bolt every day; it is used for lashing the booms or for a stop for the lines. Such a bolt is not used for hoisting cargo around the deck, it is not intended for that, they should not use it for that purpose.

(Deposition of Andrew Aezer.)

Redirect Examination by Mr. BEUM.

Water cannot seep down where this bolt was, not even if water stands there permanently.

Recross-examination by Mr. BLACK.

There is a curve in the deck where the bolt is, so no water can remain there, the water would drain to the other side.

(Witness excused.)

TESTIMONY OF MRS. OSCAR SPORGEON, FOR PLAINTIFF.

Mrs. OSCAR SPORGEON, a witness on behalf of the plaintiff, testified (sworn).

I am the wife of the plaintiff, we have been married fourteen years, and I have known him twenty-one years. He has never been sick a day previous to the accident. I receive from him about $2500.00 a year.

(Witness excused.)

Mr. HOGEVOLL.—We rest, your Honor.

Plaintiff rests. [41]

Thereupon the defendants introduced the following testimony:

TESTIMONY OF INWALD HALVORSEN, FOR DEFENDANTS.

INWALD HALVORSEN, a witness called on the part of the defendants, testified as follows (sworn).

Direct Examination.

I am a master mariner, and have been such since

(Testimony of Inwald Halvorsen.)

1914. I am now master of the "John C. Kirkpatrick." I have been such a little over one year. I was her master on August 14, 1924. I remember Oscar Sporgeon. He was the second officer. He had been second officer when the accident happened about two months. The vessel was discharging lumber at San Pedro when the accident occurred. I was not then on the ship, I came two or three hours after. I saw Sporgeon when I came on board the vessel, and I made out a hospital certificate that he demanded. After that he came back to the vessel, and proceeded with us to San Francisco. I saw the ring-bolt that pulled out of the deck. It was of the same kind as the one introduced in evidence. That is the place where the ring-bolt pulled out (pointing to the black-board). The purpose of that ring-bolt is especially for lashing down of commodities, such as booms, and it is used for stopping lines, and in rare cases I might use that a couple of times with a snatch-block. I would say you could use it for discharging a load or two, like he did. It is not intended to be used in connection with handling lines at all. I don't presume it was put in the ship for that purpose. I have never seen it used for that purpose on board the ship. This was the first time I had seen it so used. I am familiar with the usual construction of steam schooners as to this sort of equipment on vessels of the type of "John C. Kirkpatrick." A bolt of this kind is a common thing on board such vessels. It is [42] used for lashing down of booms, for stopping of

(Testimony of Inwald Halvorsen.)
lines, that is what it in most instances is used for. I was present most all the time when the cargo was being loaded on the back of the ship. Neither this ring-bolt, nor any like it, was used in connection with the loading of that cargo. Looking at the diagram and the way the lines were run on this occasion, I do not consider that this was a proper way to accomplish the result desired. The reason is that it is not safe, for the safety of the men that are handling it, or the strain on the rope, and some time you are liable to break it. If you had a snatch-block on a bolt, that would eliminate a certain amount of the strain on the rope itself. The cargo can be moved without the use of the ring-bolt. Other methods can be used to move the cargo back, that will accomplish the same result as speedily and effectively. You can take it through the lead, that is to the gypsy head, and you can pass it around; there is two leads, one on each side, especially put on the deck for that purpose; these leads are built right into the deck and by using them you can put the cargo on any part of the ship you want. By the use of leads and falls you can put it practically amidships. There were snatch-blocks on the ship at the time. We have what we call boatswain's locker, and we generally keep there such as is used in the handling of cargo, both forward and aft. We have a locker aft and we have a locker forward. We always find a block and such things to be used in them. We keep them there for safekeeping when we are not using them.

(Testimony of Inwald Halvorsen.)

I know absolutely there was a block on board at that time. We had three blocks, all in good working order. There was no general practice obtaining on the ship for the use of this equipment without a snatch-block. This was the first time in my experience that I saw a hook-up of this kind. The man stood on the wrong [43] side of the rope. In case it should carry away, he would get the worst of it.

Cross-examination by Mr. HOGEVOLL.

If the bolt had had a nut below, or was clamped below, I am sure that it would have been more safe, perfectly safe so far as the bolt was concerned. I never told Sporgeon that this bolt was not clamped below the deck, because these bolts were never used for that purpose. I knew it was not clamped, and I knew it was screwed down the deck, I knew that by looking at the bolt before the accident, but I did not tell Sporgeon. I did not tell Sporgeon where he could find the snatch-blocks. They were in the locker and were not locked up. I presume that the chief officer would look out for that.

(Witness excused.)

TESTIMONY OF H. CLEAVER, FOR DEFENDANTS.

H. CLEAVER, a witness called on the part of the defendants, testified as follows (sworn).

Direct Examination.

I am now the chief mate on the "Santa Ana," and have been going to sea for seventeen years.

(Testimony of H. Cleaver.)

I have served two years as chief and second mate on the "John C. Kirkpatrick"; that was in 1922 and 1923. I recall these ring-bolts located in the forward end of the poop-deck; they were there for the purpose of lashing the boom, and I never saw them used for any other purpose. I never saw them used in connection with snatch-blocks or otherwise, in moving cargo around the deck. I had charge of the operations of discharging cargo on the vessel for thirteen months, and nearly every trip we moved cargo from the forward part of the ship to the poop-deck. We had fair leads for that purpose, stationary on the vessel. The rolling iron-chock is stationary on the ship and to take it out you would have to take practically the whole deck. [44] It is easy and simple to move the cargo by that means alone. That is the way we did it before. I would not run a line through that ring-bolt and around this lead, over to the windlass, nor would I see other men do it either. It would not be safe, the rope will give way, if there is no fair lead, if there is no snatch-block in the ring-bolt. I have not seen the equipment on several vessels of this character. These bolts are commonly used on steam schooners; screwed to the deck, and used to lash booms with, and for lines and so forth, to keep lines from washing overboard. Life-boats are lashed down with it.

Cross-examination by Mr. HOGEVOLL.

Q. Will you come over here and tell us where you would put this particular line?

(Testimony of H. Cleaver.)

A. We would have put that line on this stationary fair lead here, and then out there, that is forward; we would connect this line up here, and the gear would be set this way. I never used this ring-bolt, I never had to use it. There was two ring-bolts, one there and one there (indicating). I don't know as there was any difference in the way they were fastened below the deck; during my time I never was interested in that, because they were not used for the purpose of loading cargo. I used them for the purpose of lashing the booms—this particular bolt. I did not see the bolt come up, I do not know if it came up straight or sideways. I don't know anything about the accident.

(Witness excused.)

TESTIMONY OF CHESTER J. LANCASTER, FOR DEFENDANTS.

CHESTER J. LANCASTER, a witness called by the defendants, testified as follows (sworn).

Direct Examination.

I am master mariner, I have been such for twenty-two years. I am now on the steamer "Santa Inez." I have seen the "John C. Kirkpatrick"; I made an inspection of the after deck of that vessel. [45] I have seen the ring-bolt on the forward part of the poop-deck. They were placed there to lash the old booms down with. That is absolutely proper and usual construction on vessels of that sort. It is proper and customary to put

(Testimony of Chester J. Lancaster.)
lag screws in for that purpose. Time and again I have seen that done in steam schooners. It shows very poor seamanship to move a load of laths from the forward part of the vessel by running a line through that ring-bolt and then around the lead, and then around the windlass. By leading a "rope yarn over a nail" there is caused so much friction in the ring-bolt, if the line carried away, not only would it be endangering the winch-driver on the after-deck, but the line on the rebound would kill somebody at the winch and the cable. The ring-bolts were placed there to lash the boom down, the old booms, before the new booms were put on; they were so long they had to build a chock to rest the boom on and rest it over the bitts, necessitating an entirely new deck arrangement for lashing booms. From the appearance and position of these bolts it would be apparent to anybody that knows seamanship that they are not to be used for moving cargo, because they are not proper bolts in deck construction. Bolts intended for the purpose of moving cargo either have an immense washer, or an iron plate countersunk into the wooden deck, and that would be visible from an inspection from the top of the ship. I have never seen any other construction for bolts designed for such a purpose. With the equipment on the "John C. Kirkpatrick," if I had had that job to do I would have moved the cargo from the forward part of the vessel directly through a permanent fair lead that is fastened, that is, secured on the deck for that purpose.

(Testimony of Chester J. Lancaster.)
By using either lead on the port side or starboard side I could have moved the cargo to any part of the vessel that I wanted to. This method [46] would be simplicity itself. That would be immediately apparent, not only to a person holding a license but also to a seaman.

Cross-examination by Mr. HOGEVOLL.

From the looks of it, I would not expect this bolt to give way when changing a load of laths weighing fifteen hundred pounds from the hatch aft.

(Witness excused.)

TESTIMONY OF ARCHIBALD L. BECKER, FOR DEFENDANTS.

ARCHIBALD L. BECKER, a witness for the defendants, testified as follows (sworn).

Direct Examination.

I am consulting engineer at the present time. I have worked in the shipbuilding business since 1900, until about four years ago. I know the normal and proper equipment on steam schooners. I have constructed them. A lag screw is not a common equipment on such schooners. It is only used on vessels where you have a small amount of tension on the part, like for lashing. You never use it where there is an opportunity of a transverse pull, unless it is used in connection with a pie-plate bolt. It is permissible to use such a bolt for lashing, providing the lashing attaches to the bolt in

(Testimony of Archibald L. Becker.)
such a way that you have a strain along the axis of the bolt, never have a transverse strain, that is, of any magnitude. I consider a ship properly equipped when it has lag screws for the purpose of lashing down the booms. I have inspected the "John C. Kirkpatrick." I found ring-bolts of such nature there; they are placed in pairs, and the impression I got of them was that they were there to secure the booms at some previous time. I noticed that they had put a new chock on the deck, and had moved the booms out more, and raised them up, and I assume that the eye-bolts were used for that purpose before this addition or change was made. At this time, I see that they can be used for lashing tanks, or some bulky load that the ship might take on [47] deck. They could be used for lashing the booms in their present location, but, of course, if the booms were stowed away there, the long booms they have there would interfere with the handling of the lines, and that was probably the reason for moving the booms outward. They could not be used as a lead to a windlass for the reason that an ordinary snatch-block hooked into either of these rings would not bring the line fair to the spools of the winch, without a pennant intervening between the ring and the snatch-block. In my opinion the location of those bolts would indicate instantly to an expert seaman that they were not designed in connection with pulling cargo, because the balance of the equipment on the ship would give an illustration to even an ordinary

(Testimony of Archibald L. Becker.)

seaman that those things were much below the standard of requirement for the purpose of handling cargo. The appearance of them as constructed would be alone sufficient to indicate that they were not there to be used for that purpose; also with reference to the location this applies.

Q. Now, Mr. Becker, supposing in moving a load of laths from over the top of the hatch to some place further aft on this vessel, a line should be run from the top of the hook, through this ring-bolt to the deck, you have just told us about, and then to the right around the lead or chock, and into the windlass, would that, in your opinion, be a proper method for accomplishing that result?

A. Well, that would be the height of folly, to use the ship's equipment in that way, by passing that manila line through that solid ring-bolt.

Q. Why?

A. Because it would wear the line out, if nothing more, and destroy the equipment. Furthermore, in passing the line through there, and if there was a great stress on there, the intensity of pressure on that ring-bolt against the line would [48] have a tendency to part the line. If the line parts with a strain on it, then the result is that the end flies against the operator of the winch, or else the whole load goes back, and swings into the rear house, and endangering the men there. It is the height of folly to pass a line through the solid eye of a ring-bolt, both from an economical standpoint and a technical standpoint.

(Testimony of Archibald L. Becker.)

Q. In your opinion, is that a proper use of that ring-bolt either with or without a snatch-block?

A. It is not, because the ring is not installed in a way to resist a transverse strain. I am familiar with the proper usage of a ship's equipment, and I have accomplished the same result of moving that load aft in several ways. A good way would be to take two lines, one to each spool around the rolling chocks that are provided there on the ship, and start the winch and throw either starboard or port side, and land it where you wanted to. The other way is to take the wood, tie it fast to the lead, put a snatch-block on the load, pull it back with the quarter chock, go ahead with the winch, and then load it wherever you want to. The latter way would not involve any more work than the other way I have mentioned, neither would it involve the expenditure of any more time, because the last way I outlined would not make it necessary to pass the end of the line through a solid eye, and overhaul it. That method would not be technical and obscure to a licensed seaman; they are all familiar with either way that I have described; either way would accomplish the result. The method I have described, or the equivalent, would be followed by a man having in mind the safety of the ship, and he would never resort to the sort of method as was followed here.

Q. Now, suppose the snatch-block had been introduced in [49] connection with this same ring-bolt in performing this operation; what effect

(Testimony of Archibald L. Becker.)

would that have had on the resulting stress upon the ring-bolt itself?

A. Well, the stress on that ring-bolt is directly proportional to the angle of lead away from the ring-bolt to the quarter block. For instance: if that lead goes away at an angle of 60 degrees, then the transverse stress on the ring-bolt is equal to the tension on the line. That is, 100% of the tension in the line. Of course, we all know if it is reversed and goes back, the stress on the ring-bolt is double the stress in the line. In other words, it is proportional for the angle of deviation from the continuation of the line leading to the ring-bolt, from the load. Now, the introduction of a snatch-block in there has a material effect of taking out the short angle of lead, and that fact would have materially reduced the transverse effect on the ring-bolt.

Q. Mr. Becker, have you—is it possible to work out mathematically the reduction of stress, that an ordinary block would have resulted in?

A. Yes, I have worked it.

Q. Have you made such calculations? A. Yes.

Q. Will you state the result of that calculation?

A. May I look at my notes?

Q. Certainly.

A. The line leading of course in a straight line, the transverse stress is zero.

Q. Say that again.

A. If the line comes through the ring-bolt in a straight line from the lead, the transverse stress on

(Testimony of Archibald L. Becker.)

the ring-bolt is zero. If, however, we lead off 15 degrees past the ring-bolt, out of the path of the line leading to the load, then the stress is one-quarter of the tension on the line. If we lead off 30 degrees, the stress is 51 per cent, well, 52—51.7. 45 degrees, 76.5, 76 hundredths of the tension of the line. [50] That is in each case. At 60 degrees it is equal to the stress in the line; at 75 degrees is 1.2 the stress in the line. 90 degrees, 1.4; 105 degrees, 1.58; 120 degrees,—up to 180 degrees is 2.

Mr. BLACK.—Q. How much difference would a snatch-block—

A. (Interrupting.) The lifting of the load is about 30 degrees, reducing the angle to about 15 degrees, or taking off about 25% of the ultimate stress.

Q. In other words, the force on that ring-bolt would have been reduced 25% by the introduction of an ordinary snatch-block?

A. Yes, from the force alone.

Q. Is there any other effect the snatch-block would have?

A. There is an effect that is a little indeterminate, but it exists, nevertheless. It is the friction of the rope rubbing through the eye-bolt, which is a considerable item. By putting in a snatch-block, you would eliminate a large percentage of that friction, and therefore reduce the stress on that eye-bolt.

Q. Could you give—are you able to give any estimate, whatever, as to the percentage of stress

(Testimony of Archibald L. Becker.)

that would be eliminated had a snatch-block been interposed in that connection?

A. Well, conservatively, the total stress to be eliminated would be 35%, I would say, as an estimate. You know, we have 25% in the angle, and 10% is very, very conservative as to the friction of the line passing through the eye-bolt. It is probably nearer 25%; to make it conservative, make it 10%, which would make the total stress laid upon the eye-bolt by not using the snatch-block 35% greater than what it would be by using the snatch-block.

Q. Now, Mr. Becker, in using the equipment in the manner which I have indicated to you it was used, at that time, several loads had been successfully moved with one of these ring-bolts, would that indicate to you that had a snatch-block been interposed the bolt would have been pulled out, or would it not? [51]

A. The bolt would have probably remained, unless the last load, the load that did pull out, was 25 to 30% in excess of the other loads. No doubt it would have stood under the same conditions.

Cross-examination by Mr. HOGEVOLL.

By the use of the snatch-block the strain on the bolt would be all of 35 per cent less. Looking at this bolt, Defendants' Exhibit 1, it is a seven-eighth (7/8) bolt, in good material on a straight pull that bolt would hold about 50,000 pounds, at least two tons and one-half ton. On a transverse pull, you

(Testimony of Archibald L. Becker.)

have nothing but the crushing strength of the wood to resist tipping the bolt over, and when you tip it over and put a pull on it the other way, in turn, you would ream that hole out, and the bolt would come out, or if the wood held you would break the bolt off, and if you broke the bolt off, you would require only one-quarter of the stress that is in a direct pull. The bolt might turn, if the stress on the line was sufficient, not with short leverage, but it might with a long leverage. If the force was sufficient it might finally come out by itself. The ring-bolts here had been placed there for the fastening of the old booms, but they might be used for the new booms. There is nothing to forestall them from putting the booms back where the old position was. There is room for them down there.

(Witness excused.)

DEPOSITION OF OLAF GRANDE, FOR DEFENDANTS.

The deposition of OLAF GRANDE was next offered and introduced in evidence on the part of the defendants, which deposition is as follows (sworn).

Direct Examination.

My name is Olaf Grande. I am first officer on the "Eldorado" and hold master's papers, unlimited. I was first officer on the "John C. Kirkpatrick" on the date of the accident. I remember [52] Oscar Sporgeon, he was second officer. At

(Deposition of Olaf Grande.)

the time of the accident we were discharging lumber in San Pedro. Sporgeon had charge of the after end of the ship at that time. I gave him orders to see that different orders came aft. There was a load to be hauled aft and away from some other lumber that had to come out first. I gave him instructions to move it aft, but not how it should be done. I did not direct him how to put up the lines, he knows that much himself. That was left entirely to him. I did not give him any instructions as to the use of an eye-bolt. I did not see any of the operation of moving this lumber aft. I was in the other end of the ship then. I first heard of the accident an hour afterwards, when the winch-driver told me about it. Sporgeon told me then that he fell over on the poop-deck by the line he was heaving the load aft with. I asked him if he was hurt, and he said, no, he did not think he was hurt. He did not complain of any pain until the next morning, then he said he did not feel good. I gave him an introduction to the marine doctor, and he left the ship. I offered him to stay in his room two days later, but he said he did not care to stay in the room, and would work around the ship, and he went with us to San Francisco, and he took his watch on the deck.

The next day after the accident, I looked at the place where the lines hit him, and I found a hole in the deck, and I also saw the bolt, it was a screw-bolt, an eye-bolt, about six or seven inches long. It pulled out whole. I looked at the wood in the

(Deposition of Olaf Grande.)
hole. It seemed to me to be in sound condition, good wood.

Cross-examination by Mr. HOGEVOLL.

There was no nut on the bolt. It was a screw without a nut. It was not bent that I could see. The wood seemed to me to be in good condition. I did not find out from my investigation [53] whether the bolt was pulled out sideways or straight out. This bolt was galvanized iron, and before such a bolt could rust, it would take a good many years, anywhere from five to twenty years. A good many years might mean seven years. The load that was pulled was what I would call an average load. It was a load of planks, 2 by 3 to 2 by 12. They are sometimes heavy, and there must have been a strain on it to pull it out. The strain would not have been near as great, if it had been a light load.

Redirect Examination.

I saw no rust on the bolt. It was not rusted. If there had been rust there, I would have seen that. I did not actually see the lumber that was moved, it was all of the same kind of lumber, practically.

(Witness excused.)

DEPOSITION OF JOHN FINCK, FOR DEFENDANTS.

The deposition of JOHN FINCK, was next introduced in evidence by defendants, which was as follows (sworn).

Direct Examination.

My name is John Finck, I am chief mate, and I have been in that position about six years, and I have a master's license. I have had much experience in unloading and discharging cargoes for twelve years by means of windlasses and leads. I know what the ordinary practice is in regard to equipment and gear which is used in moving cargoes of lumber on vessels, as I have been constantly in such business for twelve years. If I had to move a load of laths from the hatch aft I would use a snatch-block and a running line. If I wanted to move them aft, I would have the snatch-block and moving block aft and after having run the rope through the snatch-block I would run it to the windlass, to the capstan, I would not run the line through the ring-bolt in the deck, [54] because that is unsafe, there is too much strain on the ring-bolt. By having the block made fast to the ring-bolt, or some other place there, and the rope through the block the rope will go through the block so much easier, and there is not so much strain on the ring-bolt. In all my experience I have never seen a line led through a ring-bolt and around a lead to the windlass without the use of a

(Deposition of John Finck.)

block. A ring-bolt is used for stoppers for lines, for mooring lines, it is sometimes put there to make the booms fast.

Cross-examination by Mr. HOGEVOLL.

I was not present when Sporgeon got hurt, I was not on the ship. A ring-bolt may be used for the fastening of booms, that does not take much strain.

(Witness excused.)

TESTIMONY OF DR. HOWARD H. MARKEL, FOR DEFENDANTS.

DR. HOWARD MARKEL, a witness called on the part of the defendants, testified as follows (sworn).

Direct Examination.

I specialize in orthopedic surgery, by that I mean treatment of diseases or injuries to bones and joints, roughly speaking. I have treated a great many patients for injuries to the spine. I have examined Mr. Sporgeon. I first saw him in a plaster jacket that I removed, and I examined his back and had an X-ray picture taken. I found a great deal of spasm, a tenderness of the muscles on either side of the lower part of the back, but it was mostly on the right side. The X-ray shows that the original fractures which were fractures of the transverse process of the second, third and fourth lumbar vertebrae on the left side are healed. The fractures are united. The spasm and tender-

(Testimony of Dr. Howard H. Markel.)

ness of the back are not due to the fracture *per se*, that is, to the fractures themselves, but rather to a coexisting condition which [55] is shown in the X-ray, which is known as arthritis. The X-ray shows a great deal of arthritis all through the lumbar vertebrae, and by that I mean a chronic rheumatic condition of the joints of the bones, and movement of such joints is then painful. This condition is not due to the injury, it has been of long duration. There is no indication from my examination of this man that he has suffered any permanent disability, that is, not from the fracture.. If the cause of the arthritis is removed, he should get entirely well. I believe the injury has something to do with his present condition. It should be well by this time if it were free from rheumatism, considering the accident happened four or five months ago. The union in the bones is good, bony union, and is substantially as strong as it ever was; this appears from the X-ray. The X-ray shows that the fractures are healed and also shows the condition of arthritis.

(The X-ray picture was then offered and introduced in evidence as Defendants' Exhibit 3.)

Cross-examination by Mr. HOGEVOLL.

This man would have the arthritis, if he had had the accident or not; that is shown by the X-ray. The symptoms of arthritis might have developed from a slight lift or a twist; he could have an attack from lumbago which would resemble his present

(Testimony of Dr. Howard H. Markel.)
condition exactly. The symptoms of arthritis would have developed sooner or later whether he had had the accident or not. It might not have come on just when it did, had it not been for the accident, but that kind of a back would bring it out sooner or later. I believe the fractures are all healed, and that he will get well in three months, if he is given treatment for the arthritis in his back.

(Witness excused.) [56]

TESTIMONY OF ANDREW F. MAHONY, FOR DEFENDANTS.

ANDREW F. MAHONY, one of the defendants, testified as follows (sworn).

Direct Examination.

I have been engaged in shipping since 1894. I am familiar with "John C. Kirkpatrick"; she is an American vessel. I am operating that vessel on the Pacific Coast; I am the managing owner; I own 65/600th parts, and I am trustee for 5/600 parts; G. W. Hendry holds 24/600th parts, R. J. Long 45/600th parts, Rosalie Mahony, my daughter, owns 3/600th parts, Rose A. Mahony, my wife, owns 66/600ths, and other various individuals own the rest. The vessel was built on the Pacific Coast, and sold to the French government during the war, and I bought it back for delivery in New York. The vessel is inspected by the United States Government, and by the American Bureau of Inspection, which was equal to Lloyd's and which was the American

(Testimony of Andrew F. Mahony.)
standard of builders. The inspection was for seaworthiness and for protection to the freight; and it was up to the standard set by the United States Government; if it had not been they would not have issued a permit for her to operate. I made inquiries, and know from this that the inspection was made. I have the ship registered under the American Bureau, and it must be kept up to the standard of inspection. The United States Inspector of Hulls also inspected her before they would give her the flag, and they inspected her for seaworthiness, and the engine-room as well, and hulls and boilers. Personally I did not undertake to make an inspection of the ship. We leave it to the captain to look after the deck department; he in turn instructs the mate, if there is anything wrong, to report to him, and he in turn reports to the superintending engineer, who is a practical man, and he goes and looks her over; he is paid to go every time the vessel enters the harbor to give her the "once [57] over," and find out if there was anything wrong on board the ship. That is Mr. Sherman. Mr. Sherman has worked, in his infancy almost, for the Bethlehem Steel. He has worked from the bottom of the ladder, and to-day he represents six of the lumber firms of San Francisco. It is part of his duty to see that the equipment is in good condition, is safe and seaworthy. I make inquiry about the competency of my captains and mates, they are competent; most of them have worked their way upon our vessels.

(Testimony of Andrew F. Mahony.)

Cross-examination by Mr. HOGEVOLL.

I do not remember the date of the last inspection, but she must be inspected every year, as you know. The inspectors would not make any inspection in order to find out if the bolts or screws were safely fastened to the deck, that would not be within their line. If anything was wrong on that deck, the after end, that would be under the second mate. The mate would have to know if the bolts and screws were not in shape. He has charge of the after end, and reports that to his superior officer. I never saw this particular bolt, and I do not know anything about it. I told no one to look after these bolts.

Mr. HOGEVOLL.—We sued for his wages, which would be $130.00 per month.

The COURT.—That has been paid by the defendant. He got all that at the the expense of the defendant.

Mr. BLACK.—Q. As a shipowner, do you not contribute a certain amount to the maintenance of the Marine Hospital? A. Yes.

TESTIMONY OF G. W. HENDRY, FOR DEFENDANTS.

G. W. HENDRY, a witness called on behalf of the defendants, testified as follows (sworn).

Direct Examination.

I am the president of the C. J. Hendry Company; the company's [58] business is that of ship chandlers. The company has an interest in the

(Testimony of G. W. Hendry.)
"John C. Kirkpatrick." I am the managing officer of the company. I do not undertake personally to inspect the condition of vessels in which the company owns a share. I was never on board to look at the condition of the nuts and bolts on the ship. Mr. Mahony is a competent manager.

(Witness excused.)

TESTIMONY OF R. J. LONG, FOR DEFENDANTS.

R. J. LONG, a witness called on behalf of the defendants, testified as follows (sworn).

Direct Examination.

I own a 45/600th share in the "John C. Kirkpatrick." I am in the lumbering business, and I am a stockholder in several vessels. I do not undertake personally to inspect vessels nor do I know anything about the equipment on the "John C. Kirkpatrick." I leave that to the managing agent, Mr. Mahony. I have known him for several years; he is perfectly competent and capable of handling vessels; I leave all details to him.

(Witness excused.)

Defendants rest.

The COURT.—Have you any rebuttal?

Mr. HOGEVOLL.—Yes, Mr. Sporgeon.

TESTIMONY OF OSCAR SPORGEON, FOR PLAINTIFF (RECALLED IN REBUTTAL).

OSCAR SPORGEON, the plaintiff, recalled in rebuttal, testified as follows:

The reason I put the rope around this particular ring-bolt was this: When we started to heave the load aft the deck, the load was about two feet above the poop-deck, the load was about twelve or fifteen feet over the deck, and the first that happened was that the line jumped off that particular spool in the corner, she jumped clean out and nearly knocked my head off; that is the reason I had to put it in the ring-bolt to hold it down. There was another way to do it, if the mate would have given me [59] time to rig up the gears. Ole Grande was the mate. This particular ring-bolt had been used for that particular purpose, when we put the laths aboard. I never felt any arthritis before the accident. I have not been sick a day in my life.

(Witness excused.)

Mr. HOGEVOLL.—We have no further testimony.

Mr. BLACK.—The defendants move for a directed verdict in their favor in this case, for the reason that the evidence shows an entire lack of culpability in failing to make, equip and supply safe equipment for the vessel, in that the evidence conclusively demonstrated that reasonable and proper equipment was furnished on this ship, for the purposes for which that equipment was intended; and that the

injury arose entirely through a failure to use the equipment for those purposes, and from a misuse of the appliances on the vessel, and a use for purposes for which the shipowners did not intend they should be used, and the implement was originally furnished; and on the further ground that the evidence conclusively demonstrates that the entire cause of the injury was the plaintiff's failure to use the ship's equipment that was properly there to effect the purpose for which the ring-bolt was used, that carried away at the particular time.

The COURT.—I will hear you if you have anything to say in behalf of the motion.

(Argument on motion for directed verdict.)

The COURT.—The duty of a master of a ship is the same as that of any other—or of the owner of the ship is the same as that of any other employer of labor, that is to say, he must use and exercise ordinary and reasonable care to make the place and the instrumentalities with which seamen work reasonably safe. [60]

No employer of labor is an insurer that the place will be safe, nor is he an insurer of his appliances that they will be safe. All that he undertakes to do, as the law requires him to do, is to exercise reasonable care in proportion to the circumstances, to make the place and the appliances reasonably safe.

His duty in furnishing appliances is to furnish appliances reasonably appropriate for the purposes for which they are intended and supplied.

The difficulty with the plaintiff's case is that he has used the appliances intended for one purpose for

another purpose, a purpose not intended in the beginning, and which no witness on either side has said was intended for the particular purpose. A master is not obliged to furnish an instrumentality which is fit to do and intended to do one thing with, to also be fit for any other use that the servant may devote it to and injure himself. For instance, in this particular case, the seaman, the second mate in full charge of the operations, was to choose his own way of doing the work. He had that power and authority. There is no testimony that anyone directed him to select this particular way. He did it of his own volition. He could have rigged slings at other places, with blocks, to give him the purchase that he desired, that would bring his lines in the orderly arrangement that would be necessary to move this lumber, but instead of doing it, he chose this particular way, and he runs the rope through this ring-bolt, that was on the floor of the deck of the ship.

Mr. HOGEVOLL.—But—

The COURT.—Counsel will sit down, and not interrupt while the Court is talking. Now, all the evidence is that the ring-bolts were there for the purpose of lashing the masts, or the booms, when they were stowed away, when the ship is [61] at sea, or as a place for stopping lines or other lashing purposes; but they were not at all intended to serve as bases to reeve ropes for the purpose of hauling cargo or shifting or moving cargo about the ship. The construction of them would render them unsafe for that purpose. Every witness who has testified

in this case has testified that it is bad seamanship for anyone to make use of those ring-bolts for the purpose for which this plaintiff devoted them, because they are liable to turn or screw out and the friction is likely to tear them loose, as was done in this case.

Now, the Master is not obliged to guard against anything of that sort. He is not obliged to anticipate. He understands, and has a right to understand, that his seamen, and especially those that are mates and duly licensed as mates, have sufficient knowledge of seamanship to know what every appliance and instrumentality in the ship is to be used for, and to devote it to no other purpose; and if he misuses them, or devotes them for another purpose, that is something the master could not guard against. He cannot guard against the misuse of his appliances on a ship at sea, and whoever misuses them, the law says that it is his fault, and no other.

The use of a ladder, for example: it is used to go up and down on, and when the ladder was bad, and the seaman was hurt going up and down, he was putting it to the proper use, and he was injured by a defective appliance, and was held entitled to recover; but it was not held that if he took it from the place and attempted to use it as a carrier of cargo, that he would then be entitled for damages from an owner who could not help his misuse of it.

So, Gentlemen, the case as I see it—the Court always wants a case to go to a jury, when there is a chance for reasonable [62] men to differ. If there was any chance to differ on the proposition

that this was not an appliance intended to move cargo, then I would feel that the case must go to the jury; but whenever there is no evidence to that, then it becomes a question of law, and it is the Court's duty to withdraw it, and not send it to the jury in the hope that, through sympathy or some other motive of that sort, they would be moved to give a verdict for the plaintiff.

Now, there is no evidence in this case that this ring-bolt was intended by any other reasonable man to pull laths, or to be used for any other purposes than for rope-stropping, and other light work that does not place strain on it. When this plaintiff devoted this ring-bolt to moving cargo, he misused it. His owner never intended he should use it for that purpose; the owner couldn't guard against it, and if plaintiff took a chance and injured himself, he assumed all the risk, and his injury, as unfortunate as it is, is nothing for which he can ask the owners to compensate. They gave him hospitalization while he was sick; that is something they are bound to give him, no matter by what negligence of his own he is injured, and though the Master not at fault; the seaman is always entitled to look to the owner of the vessel for his hospitalization, board and lodging, until he is well, and this unfortunate plaintiff gets that in this case; but injured and hurt by his own indiscretion, his misuse of the appliances which the owner furnished him, he is not entitled to ask the Master to compensate him for the injury suffered, serious as it is.

The Court will grant the motion of the defendants, and a verdict may be entered for the defendants.

Mr. HOGEVOLL.—May I ask for an exception? [63]

The COURT.—Exception will be noted.

Mr. HOGEVOLL.—The plaintiff excepts to the ruling of the Court for the following reasons: That the testimony is in conflict, and especially the testimony of the winchman Lauritzen, who testified that that work has gone on while he was winch-driver. He was an eye-witness, and he said the bolt was used for that particular purpose; and we ask for an exception.

The COURT.—Take the exception as noted, although counsel has misstated Mr. Lauritzen's testimony.

Mr. BLACK.—Might we withdraw these exhibits from the custody of the Court?

The COURT.—Not without the consent of the other party.

And thereafter, on the 19th day of December, 1924, the parties made the following stipulation extending time:

(Title of Court and Cause.)

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING JANUARY 20, 1925, TO PREPARE AND FILE BILL OF EXCEPTIONS.

By stipulation between the parties the plaintiff is granted up to and including the 20th day of Janu-

ary, 1925, in which to prepare and serve a bill of exceptions in the above-entitled action.

Dated this 19th day of December, 1924.

(Signed) S. T. HOGEVOLL,
Attorney for Plaintiff.

McCUTCHEN, OLNEY, MANNON & GREENE,
Attorneys for Defendants.

It is so ordered by the Court.

JOHN S. PARTRIDGE,
Judge.

Filed on the 20th day of December, 1924. [64]

And now, within the time allowed by law and by said stipulation, comes the plaintiff and asks that the said and foregoing bill of exceptions may be considered a full, true and correct bill of exceptions in the above-entitled action.

Correctly engrossed as settled.

S. T. HOGEVOLL,
Attorney for the Plaintiff.

STIPULATION RE SETTLING AND ALLOWING BILL OF EXCEPTIONS.

By consent of the parties, the above and foregoing bill of exceptions may be signed, settled and allowed as true and correct.

Dated this 13 day of March, 1925.

S. T. HOGEVOLL,
Attorney for the Plaintiff.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON & GREENE,
Attorneys for Defendants.

ORDER SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions, having been correctly engrossed as settled, and being now presented to the Court in due time and found to be correct after amendment by the Court, the same is hereby settled, certified and allowed, as a true bill of exceptions taken upon the trial of the issues in said cause and of the law herein.

Dated this 14 day of March, 1925.

BOURQUIN,
Judge of said Court.

[Endorsed]: Filed Mch. 16, 1925. Walter B. Maling, Clerk. [65]

In the District Court of the United States in and for the Northern District of California.

No. 17,168.

OSCAR SPORGEON,

Plaintiff,

vs.

ANDREW F. MAHONEY et al.,

Defendants.

ORDER ALLOWING WRIT OF ERROR.

Upon motion of S. T. Hogevoll, attorney for the plaintiff in the above-entitled action, and upon the filing of the petition for writ of error and assignments of error:

IT IS ORDERED that writ of error as prayed for in said petition be allowed, and that the amount of the supersedeas bond be given in the sum of Two Hundred and Fifty Dollars, and that upon giving of said bond all proceedings be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated this 29 day of April, 1925.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed Apr. 29, 1925. Walter B. Maling, Clerk. [66]

In the District Court of the United States in and for the Northern District of California.

No. 17,168.

OSCAR SPORGEON,

Plaintiff,

vs.

ANDREW F. MAHONEY et al.,

Defendants.

PETITION FOR A WRIT OF ERROR.

Oscar Sporgeon, the plaintiff in the above-entitled action, feeling himself aggrieved by the order of the Court in the above-entitled action whereby the jury was instructed to return a verdict in favor of the defendant and against the plaintiff on or about the seventeenth day of December, 1924, and

judgment entered thereupon according to such instructed verdict, comes now by S. T. Hogevoll, his attorney, and petitions said Court for an order allowing him the said plaintiff, to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the bond which the said defendant shall give, and furnish upon said writ of error, and that upon the giving of a supersedeas bond all further proceedings in this court be suspended, stayed and superseded until the determination of said writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

And your petitioner will ever pray.

Dated this 28th day of April, 1925.

S. T. HOGEVOLL,
Attorney for Plaintiff and for Plaintiff in Error.

[Endorsed]: Filed Apr. 29, 1925. Walter B. Maling, Clerk. [67]

In the District Court of the United States in and for the Northern District of California.

No. 17,168.

OSCAR SPORGEON,

Plaintiff,

vs.

ANDREW F. MAHONEY et al.,

Defendants.

ASSIGNMENTS OF ERROR.

Now comes Oscar Sporgeon, the plaintiff in the above-entitled cause, by S. T. Hogevoll, his attorney, and specifies the following as errors upon which he will urge his writ of error in the above-entitled action.

(1)

The Court erred in sustaining the motion of the defendant for a directed verdict in the favor of the defendants and against the plaintiff at the end of the testimony.

(2)

The Court erred in the following matters at the end of the trial:

Mr. HOGEVOLL.—The plaintiff excepts to the ruling of the Court for the following reasons: That the testimony is in conflict, and especially the testimony of the winchman Lauritzen, who testified that that work had gone on while he was winch-driver. He was an eye-witness, and he said the bolt was used for that particular purpose, and we ask for an exception.

The COURT.—Take the exception as noted, although the counsel has misstated Mr. Lauritzen's testimony.

Dated this 28th day of April, 1925.

S. T. HOGEVOLL,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 29, 1925. Walter B. Maling, Clerk. [68]

In the District Court of the United States in and for the Northern District of California.

No. 17,168.

OSCAR SPORGEON,

Plaintiff,

vs.

ANDREW F. MAHONEY et al.,

Defendants.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That we Oscar Sporgeon, as principal and H. Slikeman and A. L. Eggum, as sureties, are held and firmly bound unto the defendants and each of them jointly and severally in the sum of Two Hundred and Fifty ($250.00) Dollars, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated this 28th day of April, 1925.

The condition of the above undertaking is such that whereas the above-named plaintiff, has sued out a writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit to reverse the judgment entered in the above-entitled action in favor of the defendants and against the plaintiff for costs, for —— Dollars. [69]

Now, therefore, the condition of this obligation is such that if the above-bounden, Oscar Sporgeon, shall prosecute such writ of error to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise to be and remain in full force and effect.

We further agree and bind ourselves, jointly and severally by these presents, that in the event of a breach of any conditions herein, the Court may, upon ten days' notice, proceed summarily in the action or proceeding to ascertain the amount due on said breach for which this bond is given, and render a judgment and issue an execution for such amount as may be found to be due.

Dated this 28th day of April, 1925.

OSCAR SPORGEON.
By S. T. HOGEVOLL,
His Attorney.
H. SLIKEMAN.
A. L. EGGUM.

State of California,
City and County of San Francisco,—ss.

H. Slikeman and A. L. Eggum, being by me first duly sworn, each for himself, deposes and says: That he is a resident and a freeholder within the State of California, and is worth the sum specified in the within undertaking over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

H. SLIKEMAN and
A. L. EGGUM.

Subscribed and sworn to before me this 28th day of April, 1925. [70]

[Seal] JOHN L. MURPHY,

Notary Public in and for the City and County of San Francisco, State of California.

The within bond is approved this 29th day of April, 1925.

JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed Apr. 29, 1925. Walter B. Maling, Clerk. [71]

In the Southern Division of the United States District Court for the Northern District of California.

Clerk's Office.

No. 17,168.

OSCAR SPORGEON,

Plaintiff,

vs.

ANDREW F. MAHONEY et al.,

Defendants.

PRAECIPE FOR PREPARING TRANSCRIPT ON APPEAL.

To the Clerk of Said Court:

Sir:

Please prepare the record on appeal and include the following papers:

(1) Complaint filed on or about Sept. 3d, 1924.
(2) Answer to complaint filed about Oct. 24th, 1924.
(3) Order directing verdict.
(4) Judgment entered on the directed verdict about Dec. 17th, 1924.
(5) Bill of exceptions filed about March 16th, 1925.
(6) Assignments of error filed April 29, 1925.
(7) Petition for writ of error filed about April 29, 1925.
(8) Citation on writ of error filed April 29, 1925.
(9) Order allowing writ of error filed about April 29, 1925.
(10) Writ of error filed about April 30, 1925.
(11) Bond on writ of error filed about April 29, 1925.

S. T. HOGEVOLL,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 29, 1925. Walter B. Maling, Clerk.

[Endorsed]: No. 17,168. In the Southern Division of the United States District Court, Northern District of California. Oscar Sporgeon vs. Andrew F. Mahoney. Praecipe for Preparing Transcript on Appeal. [72]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing seventy-two (72) pages, numbered from 1 to 72, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $30.65; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of May, A. D. 1925.

[Seal] WALTER B. MALING,

Clerk United States District Court for the Northern District of California. [73]

In the District Court of the United States in and for the Northern District of California.

No. 17,168.

OSCAR SPORGEON,

Plaintiff,

vs.

ANDREW F. MAHONEY et al.,

Defendants.

WRIT OF ERROR.

The President of the United States, to the Honorable, the Judges of the District Court of the United States for the District Court, Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you, between Oscar Sporgeon, plaintiff in error, and Andrew F. Mahoney et al., defendants in error, a manifest error has happened to the great damage of the said plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then and under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth

Circuit, together with this writ, so that you have the same at the city of San Francisco in the State of California, on the 28th day of May, 1925, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings [74] aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the errors, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 29th day of April, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States, Northern District of California.

Allowed by

JOHN S. PARTRIDGE,
Judge.

Service of the within writ and receipt of a copy thereof is hereby admitted this —— day of ——, 1925.

————————————,
Attorneys for Defendants.

Due service of the within writ of error is hereby admitted on the 29th day of April, 1925.

McCUTCHEN, OLNEY, MANNON & GREENE,
Attorneys for Defendants.

[Endorsed]: No. 17,168. In the Southern Division of the United States District Court for the

Northern District of California, Second Division. Oscar Sporgeon, Plaintiff, vs. Andrew F. Mahoney et al., Defendants. Writ of Error. Filed Apr. 30, 1925. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [75]

RETURN TO WRIT OF ERROR.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern District of California. [76]

In the District Court of the United States in and for the Northern District of California.

No. 17,168.

OSCAR SPORGEON,

Plaintiff,

vs.

ANDREW F. MAHONEY et al.,

Defendants.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States to Andrew F. Mahoney, the defendant herein, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 29th day of May, 1925, being within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Northern District of California wherein Oscar Sporgeon is the plaintiff in error and Andrew F. Mahoney et al., are the defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JOHN S. PARTRIDGE, Judge of the District Court of the United States in and for the Northern District of California, this 29th day of April, 1925.

JOHN S. PARTRIDGE,
United States District Judge.

Service of the within citation by copy, admitted this —— day of ——, 1925.

————————————,
Attorneys for Defendants in Error.

Due service of the within citation is hereby admitted on the 29th day of April, 1925.

McCUTCHEN, OLNEY, MANNON & GREENE,

Attorneys for Defendants.

[Endorsed]: No. 17,168. In the Southern Division of the United States District Court for the Northern District of California, Second Division. Oscar Sporgeon, Plaintiff, vs. Andrew F. Mahoney et al., Defendants. Citation on Writ of Error. Filed Apr. 30, 1925. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [77]

[Endorsed]: No. 4586. United States Circuit Court of Appeals for the Ninth Circuit. Oscar Spurgeon, Plaintiff in Error, vs. Andrew F. Mahony, Andrew F. Mahony, Trustee, Rose A. Mahony, Rosalie Mahony, Rose C. Mahony, Marie J. Heaphey, C. J. Hendry Co., Inc., Gertrude M. Kinney, Carl T. Long, Marguerite M. Long, James McLaughlin, Gertrude C. McCabe, Robert J. Long, Emil Klicka, George A. Stock, William Anderson and John C. Kirkpatrick, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed May 6, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4586

9

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OSCAR SPORGEON,
Plaintiff in Error,

vs.

ANDREW F. MAHONEY et al.,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

S. T. HOGEVOLL,
Pacific Building, San Francisco,
Attorney for Plaintiff in Error.

FILED
OCT 29 1925
F. D. MONCKTON

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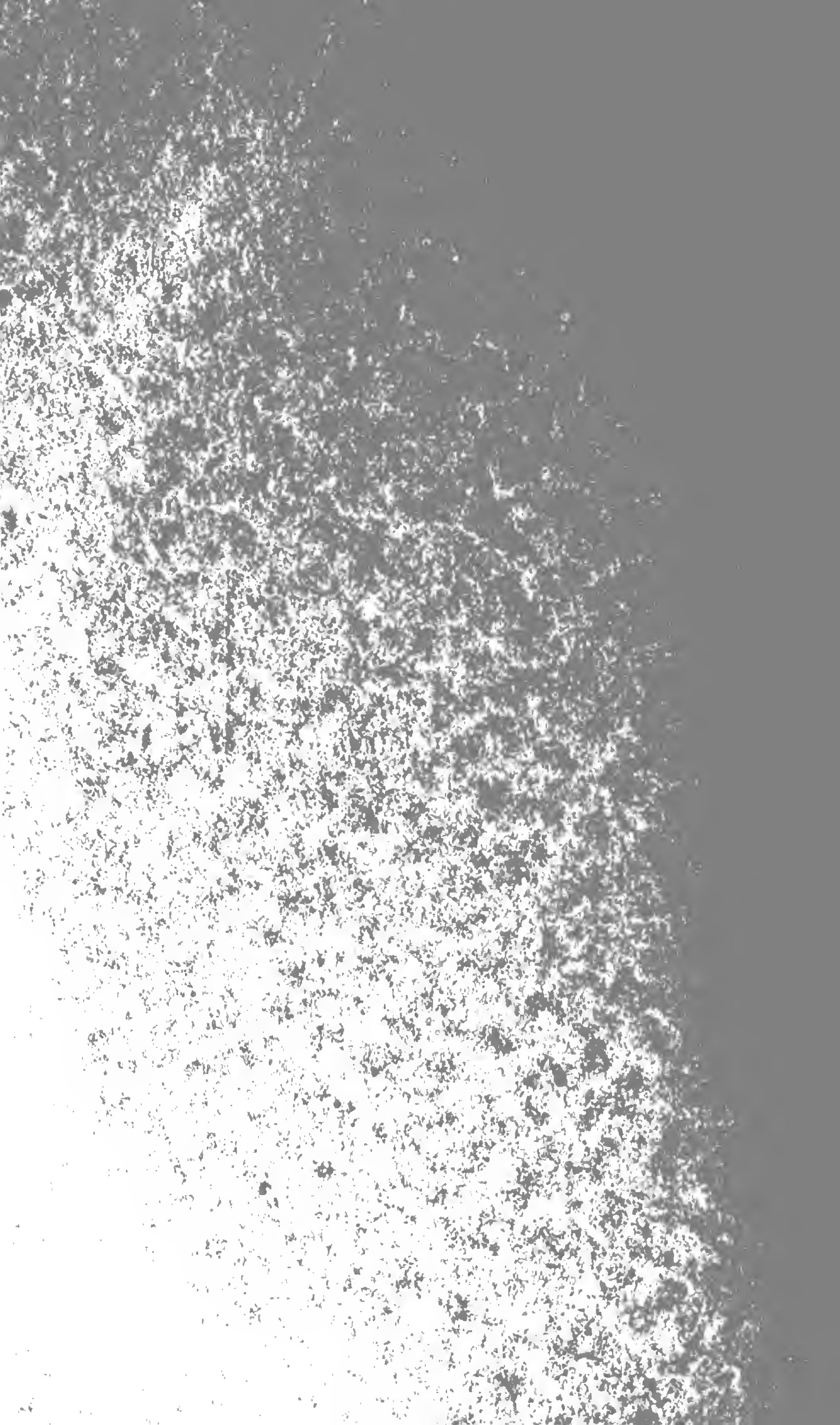

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No. 4586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OSCAR SPORGEON, *Plaintiff in Error,* vs. ANDREW F. MAHONEY et al., *Defendants in Error.*	}

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the third of September, 1924, the plaintiff commenced the action on the law side of the court claiming that he had suffered permanent injury while he was acting as second mate on a vessel known as "John C. Kirkpatrick." The complaint set out that the cause of the injury was that a certain bolt "was pulled loose on account of the manner in which it was fastened to the deck, and on account of the rotten condition of said deck." (T. 4.)

The answer among other matters says that the bolt was not loose, but that it was pulled out "by reason of the failure to use a block in connection with said eye-bolt, said bolt was subjected to an enormous and severe strain", etc. (T. 12.)

Again under separate defense number three the defendant plead that the injury to plaintiff was "plaintiff's failure to use a block in connection with the rope running through the eye-bolt." (T. 15.)

The answer also set out that the plaintiff was familiar with "the mode of fastening the eye-bolt to the deck," etc. (T. 14.)

The case came on regularly for trial before the Hon. Geo. M. Bourquin, J., who at the end of the trial directed a verdict for the defendants. The grounds assigned in the motion for a directed verdict were as follows:

(1) There was no negligence shown on the part of the defendants.

(2) The plaintiff assumed the risk. We believe that such was the court's idea from the following expression by the court in granting the motion at the end of the trial for a directed verdict. The court said:

"When the plaintiff devoted this ringbolt to moving cargo, he misused it. Its owner never intended it should be used for that purpose; the owner could not guard against it, and if plaintiff took a chance, and injured himself, *he assumed all the risk,* and his injury, as unfortunate, as it is, is nothing for which he can ask the owners to compensate him."

EVIDENCE IN THE CASE.

On page 36 of the transcript is a drawing made by the defendant's counsel, and for that reason is as favorable to the defendant as it can possibly be.

The testimony is uncontradicted that it was the duty of the mate, Ole Grande, to see that the ring-bolt in question, and which pulled out and thereby injured the plaintiff, was safe. (T. 71.) It was this same Ole Grande who refused the plaintiff a snatch-block, of which they had plenty on the vessel. (T. 28.) There is a great deal of testimony in favor of plaintiff as well as in favor of the defendant having reference to the proper use of the ring-bolt. The testimony is greatly in conflict on that point.

Witness Frank H. Ainsworth for plaintiff testified:

"The ringbolt, defendant's exhibit No. 1, is what they call a ringbolt with a lag-screw, and it is used for various purposes on ships to secure articles. One could not tell by looking at it, except from below, if this bolt was clinched under deck. *If a person sees a bolt of that size on the deck, they would use it for the purpose for which it would be necessary to use a bolt of that size.* There are several methods used in order to make a bolt solid so it will not come out or work loose, one by riveting it over a washer, one by putting a nut over a washer, and one by putting a key through it, over a washer. That would make a good solid method. I imagine the wood around such a bolt would become soft if

used for six or seven years. If hit by lumber from time to time, it would tend to loosen it and when loosened it would come out." (T. 40.)

On cross-examination the witness testified:

"It is a common practice, but not a good practice, to run a line through a ringbolt of this kind."

The last statement is important because the judge found that the plaintiff when using the bolt for the purpose of putting a line through it used it for a purpose for which it was not intended. (T. 77.) The court said:

"His misuse of the appliances which the owner furnished him, he is not entitled to ask the master to compensate him for the injury he suffered, serious as it is." (T. 77.)

Lauritzen, a witness called for the defendant testified that he was the winchman on the vessel at the time of the accident. There were three eye-witnesses to the accident; one is Lauritzen and the other is plaintiff. Mr. Lauritzen had been a winchman on the ship for a long time, and he knew better than any other person that this ring-bolt was not used in any improper manner. He testified as follows:

"Q. You have been a winchdriver for many years, haven't you?

A. Yes sir." (T. 22.)

"Q. And saw them use this particular bolt in many places the same as it was used that time; it was nothing unusual?

A. They usually lead it the way it will lead best.

Q. And at this time, fastened the way it was, you took it for granted it was like any other bolt on the ship?

A. Yes, sir."

"The ship was built in 1917, and the water was bound to seep in and weaken it for this length of time," said witness Lauritzen. (T. 23.)

He also said that he had never seen such a bolt used for such purpose. By that he meant a bolt without being clinched.

Lauritzen said: "No wonder it pulled out, because I thought it was rather small." (T. 24.)

The court forgot entirely the testimony of the plaintiff's witnesses, which is shown in many instances, and as to the improper use of the appliances on which the court based its whole decision the following is only one instance of the fact that the court forgot the testimony. The court said:

"He (the plaintiff) could have rigged slings at other places with blocks." (T. 75.)

The court was mistaken in this statement, as appears from the following testimony of plaintiff:

"I could not find any blocks. (T. 39.) The chief officer told me that he didn't know that there was any on board the ship." (T. 37.)

The master said:

"There were snatch-blocks on the ship at the time. (T. 51.) If you had a snatch-block on the

bolt that would eliminate a certain amount of strain. (T. 51.) I might say in rare cases I might use that a couple of times with a snatch-block. I would say you could use it for discharging a load or two like he (the plaintiff) did." (T. 51.)

Witness Becker, for the defendants, said:

"By the use of a snatch-block the strain on the bolt would be all of 35 per cent less." (T. 62.)

Plaintiff said:

"The chief officer (that was Mr. Grande) was aft using them particular ringbolts loading the ship." (T. 28.)

This is not contradicted.

The reason for the directed verdict was that the plaintiff did not make a proper use of the appliances and particularly this ring-bolt and snatch-block, but on this point the testimony was in conflict, even the master on the vessel testified as follows:

"I would say you could use it" (meaning the ring-bolt that was pulled out) "for discharging a load or two like he did." (T. 50.)

Mr. Lancaster, an old mariner, called by the defendants, said:

"From the looks of it" (that is the ring-bolt), "I would not expect this bolt to give way when changing a load of laths weighing fifteen hundred pounds from the hatch aft." (T. 56.)

It is true that both the master on plaintiff's own vessel as well as Captain Lancaster from another

vessel testified that plaintiff had improperly rigged up the load, but no testimony is given to the effect that plaintiff could anticipate an accident by reason thereof. In other words there is no testimony of any witness to the effect that this bolt was supposed to stand a strain of no more than fifteen hundred pounds, the weight of the load.

The vessel had been inspected, but not as to bolts. That is what one of the owners said:

"The inspectors would not make any inspection in order to find out if the bolts or screws were safely fastened to the deck."—"The mate would have to know if the bolts and screws were not in shape. He has charge of the after end and reports to his superior officer." (T. 71.)

It was this first mate who "came around, and cursed and swore at the second mate (the plaintiff), because the lumber was not coming fast enough." That is the testimony of witness McFadden. (T. 46.)

This bolt was supposed to stand a strain of between 5,000 and 50,000 pounds, and it was pulled out when a load was hoisted weighing according to the plaintiff 1,000 pounds (T. 32), and according to witness McFadden 1,500 pounds. By reason of want of snatch-blocks and the angle an additional stress of 35 per cent would be added. That would make the total stress, or pull not more than 2,025 pounds which is the greatest pull under any testimony, but according to plaintiff himself, "It was just like it slid out."

Ole Grande, for the defendant, testified that if the plaintiff had pulled a light load, the strain would not have been near as great. (T. 65.) This witness whose duty it was to look out for the safety of the ring-bolt, testified as follows:

"The load that was pulled out was what I would call an average load. It was a load of planks, 2 by 3 by 12. They are sometimes heavy, and there must have been a strain on it to pull it out. The strain would not have been near as great, if it had been a light load." (T. 65.)

This witness is mistaken when he says that it was an average load, as he admits that he did not see the accident. (T. 64.) He was there using "them particular kinds of ringbolts." (T. 28.) This probably explains why he did not object to plaintiff using them, but hurried him up.

We have already shown that there were two witnesses who testified that it was a light load. (T. 32 and 45.) Since it was the duty of the mate to see that the bolts were safe, we cannot blame the plaintiff for acting quickly when this mate came and said:

"You people are too slow; put that load in there." And he did not give the plaintiff time "to rig up anything." (T. 38.) The master on the vessel knew that the bolt was not clamped, and he knew that the bolt was simply screwed down, but he did not tell Sporgeon about that. (Testimony of the master, T. 52.) The only place where the plaintiff

had seen such ring-bolts screwed down was on the ship's forecastle heads. (T. 39.) Such a bolt without a nut, known as a lag screw, is very liable to work loose. This was explained by witness Becker on his cross-examination as follows:

"And when you tip it over and pull on it the other way, in turn, you would ream the hole out, and the bolt would come out, or if the wood held you would break the bolt off, *you would require only one quarter of the stress* that is in a direct pull. The bolt might turn if the stress on the line was sufficient, not with short leverage. If the force was sufficient it might finally come out by itself." (T. 63.)

When it is remembered that the plaintiff used this ring-bolt not to unload the vessel, but simply to get the laths out of the way for the purpose of unloading the vessel, he does that which the master of the vessel said that he could do. The master testified:

"I would say you could use it for discharging a load or two like he did." (T. 50.)

Lauritzen also said the same. He said:

"I have been a winchdriver for many years and I saw them use this particular bolt in many places the same as it was used that time. It was nothing unusual, and they usually lead it the way it will lead best, and they do not stop to make inquiry, if the bolt is fastened enough." (T. 22.)

It was the first load that Lauritzen picked that injured the plaintiff. (T. 22.)

There was conflict in the testimony, if the bolt was properly fastened, and there was conflict in the testimony, if the bolt was improperly used.

The improper fastening of the bolt was shown by the following witnesses:

Witness Ainsworth. (T. 40.)

Witness Sporgeon, plaintiff. (T. 39.)

Witness Moriarity: "there are several ways of fastening such a bolt, some have a shoulder, and you screw them in, underneath they sometimes put a washer or a grummet to prevent leakage. Evidently there was no washer on that bolt."—"A man on the deck cannot tell how it is fastened below."

Witnesses for the defendants testified to the contrary.

The master said: "A bolt of this kind is a common thing on board such vessel." (T. 50.)

Witness Cleaver said: "These bolts are commonly used on steam schooners." (T. 53.)

Witness Lancaster: "It is proper and customary to put lag screws in for that purpose." (Lashing cargo.) (T. 55.)

Witness Becker testified strongly for the defendant but he also said: "A lag screw is not a common equipment on such schooners."

Witness Ole Grande, the mate, did not say one word as to the proper or improper method of fastening the bolt (T. 63), and still it was his duty to see that everything was safe. The managing owner

said: "The mate would have to know if the bolts and screws were not in shape." (T. 71.)

CONFLICT IN TESTIMONY AS TO THE METHOD OF DOING THE WORK.

The following witnesses testified that the plaintiff followed the proper method when it came to move a light load. And it is important to bear in mind that the vessel was not discharging cargo, but at the time of the injury the vessel was getting ready to discharge cargo and for that purpose plaintiff moved a small load of laths from the hatch.

Witness Oscar Sporgeon, the plaintiff. (T. 28.)

Witness Ainsworth (T. 41) said, "it is a common practice but not a good practice."

The master said: "I would say you could use it for discharging a load or two, like he did." The mate used such bolts. (T. 28.)

Witness Lauritzen: he "saw them use this particular bolt in many places the same as it was used that time. They usually lead the way it will lead best." (T. 22.)

At the end of the testimony the court granted a directed verdict, and from the records it appears that the court had forgotten especially the testimony of witness Laurtizen to which his attention was especially called when the plaintiff's attorney asked for an exception.

The attorney for the plaintiff said:

"The plaintiff excepts to the ruling of the court for the following reasons: That the testimony is in conflict, and especially the testimony of witness Lauritzen, that the work had gone on while he was a winchman. He was an eye-witness, and he said the bolt was used for that particular purpose, and we ask for an exception.

The Court. Take the exception as noted, although the counsel has misstated Mr. Lauritzen's testimony."

Lauritzen testified that it was "the first load I picked up. He had been a winchdriver for several years and that they generally lead the way it will lead best.

Q. And saw them use this particular bolt in many places the same as it was used that time, it was nothing unusual?

A. They usually lead the way it will lead best." (T. 22.)

It is strange that the plaintiff can be said to have used the ring-bolt in an improper manner when the master on the ship testified that it could be used for a load or two even for discharging.

The master said: "I would say you could use it for discharging a load or two, like he did." (T. 50.)

The testimony was that the matter of safety was left to the mate. This was shown both by the master and by the owner, and the bolts had never been inspected, as that was no part of the government's duty. (T. 71.)

ARGUMENT AND AUTHORITIES.

We think that Rule 93 of the rules of this court has the correct idea about when a directed verdict may be directed. This rule of court reads:

> "either party to an action at law tried with a jury, may at the close of the evidence on both sides, move the court for an instruction to render a verdict in his favor, and if the case be such, that assuming in favor of the opposite party everything which the evidence tends to prove, to-wit, everything which the jury might properly infer from it, nevertheless, he has, as a matter of law, no cause of action or defense, as the case may be, the court must grant the motion."

POINT ONE.

When the evidence is in conflict, it is a matter for the jury and not for the court, and if the testimony is such that reasonable men might differ it is for the jury to decide the facts.

In *Burch v. Southern Pacific R. R. Co.,* 32 Nev. 75, 104 Pac. 225, 1912 B. Ann. Cas. 1160, the court says:

> "The rule is well established in this and other courts that in considering the granting or refusing a motion for a nonsuit the court must take as proven every fact which the plaintiff's evidence tends to prove, and which was essential to his recovery, and every inference of facts that can legitimately be drawn therefrom, and give to the plaintiff the benefit of all legal presumptions, arising from the evidence and interpreting the evidence most strongly against the defendant."

The Supreme Court of California, in *Hanley v. Cal. Bridge and Construction Co.,* 127 Cal. 237, 59 Pac. 577, 47 L. R. A. 597, says:

> "In actions, like the present one, questions of negligence are for the jury to determine: and it is only when the facts are undisputed, and are such that reasonable men can draw fairly only one conclusion from them, that the question of negligence is ever considered one of law for the court."

The above is still the rule in California, as we can see from a late work, 9 *Cal. Jur.* 558, where it is said:

> "It (the court) should deny a motion for a nonsuit, even where there is a conflict in the evidence and some testimony tends to sustain plaintiff's case, or where the evidence of the plaintiff is such that different conclusions can reasonably be drawn therefrom. If there is any doubt, it is the duty of the court to let the case go to the jury."

On page 563 of Vol. 9 *Cal. Jur.,* the same author says:

> "In other words, when once a plaintiff has adduced such evidence as if uncontradicted would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury. Whenever a plaintiff proves a state of facts from which a presumption arises, such a presumption is evidence, which, even, if disputable is sufficient to support a finding in accordance therewith notwithstanding there may be evidence to the contrary. Therefore the mere fact that the defendant introduces evidence in conflict with the

presumption does not dispel it so as to entitle him to a nonsuit. Whether the presumption has been controverted is a question for the jury."

9 *Cal. Jur.*, 563.

JURY TRIAL HAS BEEN GRANTED TO SEAMEN.

On June 5, 1920, Congress passed a law to the effect that a seaman should have the same right as an employee of an interstate common carrier, and a jury trial. This section reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election maintain an action at law, with the right of a trial by jury and in such action all statutes of the United States, modifying or extending the common law rights or remedy in cases of personal injury to railway employees shall apply," etc.

7568 Comp. Stat. of the U. S., Amending the Act of March 4th, 1915.

The Railway Employees statute which is adopted, reads as follows:

> "Every common carrier by railroad while engaged in commerce between any of the several States or Territories, or between any of the several States or Territories, or between the District of Columbia, or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," etc. * * * "for such injury or death resulting in whole or in part from the negligence of any of its officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence,

> in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."
>
> Law of April 22nd, 1908, 35 Stat. 65.

The above section mentions two different kinds of negligence: One is the negligence of a fellow servant, and the second is the negligence "by reason of any defect or insufficiency in its cars, engines," etc.

The plaintiff proved in the case at bar negligence of a fellow servant as well as negligence in the appliances as follows:

(I) Negligence of a Fellow Servant:

(a) The master of the vessel knew that the bolt was not clamped, but simply screwed on and did not tell Sporgeon about it. (T. 52.)

(b) The negligence of the mate who said, "You people are too slow," and did not give the plaintiff "time to rig up anything." (T. 38.)

(c) It was the mate's duty to inspect the bolts, and there had been no inspection, so far as we know, for seven years. (T. 70.)

(d) If it is a fact that the plaintiff was negligent in using the ring-bolt he was negligent by order of his superior, whose orders a seaman must obey, and because his superior used that kind of bolts. This is shown by the following testimony of plaintiff:

Plaintiff testified:

"I was busy, and I walked aft again, the chief officer and third officer were aft using them particular ringbolts loading the ship." (T. 28.)

"Q. Just a minute. Do we understand that you say that the ringbolt that you now mentioned was used in the same way, as you had used it by everybody else on the ship?

A. Yes, sir." (T. 28.)

(c) Grande, the chief officer was negligent in not giving the plaintiff a snatch-block. (T. 28.) There were three snatch-blocks on the vessel. (Testimony of the master.) (T. 52.)

"The force of the ringbolt would have been reduced 25% by the introduction of an ordinary snatch-block." (Testimony of Mr. Becker, for the defense.) (T. 61.)

(II) Negligence in the Equipment:

The railroad employees liability law which has been made applicable to seamen makes the employer liable also for an injury by "reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or any other equipment." Negligence in the equipment was proven:

(a) "In order to make a bolt solid so it will not come out or work loose one way is riveting it over a washer, one by putting a nut over a washer, and one by putting a key through it over a washer."

Plaintiff testified:

"The difference in fastening—seamen, sir—do not use that kind of bolts on a ship for any purpose whatsoever, for heaving, or lashing or holding, be-

cause that bolt is unsafe to be on board a ship." (T. 31.)

The testimony of the plaintiff is corroborated by witness Moriarity who said:

"A bolt like that, with such awful small threads wouldn't have any hold at all, but this cannot be told from the way it is screwed in." (T. 43.)

A Verdict Directed For the Plaintiff Would Have Been Justified.

Ole Grande was the chief officer who gave the order to plaintiff and who did not give the plaintiff time to get the snatch-blocks. (T. 29.) This is not denied in the testimony of the chief officer. (T. 63.) He was the first mate who cursed and swore at plaintiff because the lumber was not moving fast enough. Witness McFadden testified: "In the meantime the first mate had come around, and cursed and swore at the second mate (plaintiff) because the lumber was not coming fast enough." (T. 45-56.) It was the duty of the same officer to see that everything was safe on the "deck-department." This appears from the testimony of the managing owner, Mr. Mahoney, as follows:

"We leave it to the captain to look after the deck-department, he in turn instructs the mate, if there is anything wrong, to report to him, and he in turn reports to the superintending engineer, who is a practical man, and he goes and looks her over." (T. 70.)

True it is that the mate said, "I did not give him any instructions as to the use of an eye-bolt" (T. 64), but the mate spoke about a heavy load of planks which he must have had in mind and not the small load of laths which constituted the load that was lifted when the injury happened. This appears from the following:

"It was a load of planks, 2 by 3 by 4, and they are sometimes heavy, and there must have been a strain on to pull it out. The strain would not have been near as great, if it had been a light load." (T. 65.) The mate said, "I did not see the accident, I first heard of the accident an hour afterwards." (T. 64.)

Now since this very mate had charge of the safety of the deck-department, and since the mate does not deny that the plaintiff told the truth when plaintiff testified that he asked for snatch-blocks and the mate did not give him any, it shows that if the plaintiff had asked for a directed verdict the court would have been justified in granting the demand. We are aware of that since the plaintiff did not ask for such a verdict we cannot at this time complain that it was not given. But our contention is that the testimony is all one way, and that the court erred in granting any directed verdict for the defendant, since there was no defense shown to the plaintiff's testimony. This argument is correct only on the theory that the doctrine of assumption of risk and contributory negligence are no defenses in an action when a seaman acts under orders.

In the case of *Grimberg v. Admiral Oriental Line,* Judge Cushman, July 7, 1924, 300 Fed. Rep. 619, the court held that a seaman is not assuming the risk as it is generally understood. In that case the injury was due to the fact that the plaintiff tripped and fell over an iron bar holding down a tarpaulin over the hatch cover, which was negligently not fastened. The court uses the following language:

> "In the present case it has been argued that the risk of the injury from the cause described was assumed by plaintiff. Employers' Liability Act of 1908, Sec. 4 (Sec. 8660, Comp. Stat.), provides that an employe—
>
> 'shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.'
>
> The effect of this was to leave the general defense of assumption of risk. Seaboard Air Line Railway v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1 Ann. Cas. 1915B, 475. supra. It therefore follows that an injured seaman must he held to have assumed the risk of injury from any and all those dangers ordinarily and naturally incident to the service in which he engages; but it cannot be that Congress intended to make applicable to seamen the entire doctrine of assumption of risk, as the same has been developed under the law of railway carriage. This necessarily results from the difference in the terms of the two employments. The servant or employe on shore is free to quit at will his employment, if there appear to him dangers in it; this the seaman cannot do.
>
> The seaman, for desertion, forfeits not only the wages he has earned, but the clothes and

effects he leaves on board. For neglect of duty he is subject to forfeiture of part of his wages. For willful disobedience to lawful command he is not only liable to forfeiture of part of his wages, but to be placed in irons, as well; for continued willful disobedience to lawful command, he is not only subject to penalties and punishment similar in kind, but to be put on bread and water, with full rations every fifth day. Section 8380, Comp. Stat. The seaman's neglect of duty or refusal to do a lawful act, under certain circumstances, subjects him to imprisonment. Section 8383, Comp. Stat. Not only under the law, by refusing to do the work required of him, does he incur the risk of forfeiture and punishment, but during the voyage he is physically unable to leave the ship.

The seaman does not assume the risk of injury resulting from the unseaworthiness of the vessel, defective appliances, or a place to work not made reasonably safe, although with knowledge of the danger he continues in the employment. Cricket S. S. Co. v. Parry (C. C. A.), 263 Fed. 523, at 525 and 526, certiorari denied Cricket Steamship Co. v. Parry, 252 U. S. 580, 40 Sup. Ct. 345, 64 L. Ed. 726. The danger of injury because of negligence, if any, in failing to provide means to fasten the iron bar in place, the plaintiff would not assume. Cricket S. S. Co. v. Parry (C. C. A.), 263 Fed. 523, supra. If there was no negligence in the foregoing respect, and the iron bar was either negligently placed in the position described, or negligently permitted to get and remain in such position, which negligence was that of an officer of the ship or member of the crew other than plaintiff, the plaintiff would not, without more, assume the risk of injury arising from such negligence; for the Employers' Liability Act and the La Follette Act both abolish the defense of a fellow servant's negligence."

In *Lynot v. Great Lakes Transit Co.,* 195 N. Y. Suppl. 13, citation from page 19, the Appellate Division of the Supreme Court in N. Y. says:

> "Here, however, the action is under the maritime law and not under the common law and the rule in respect to assumption of obvious risks is not a part of the general maritime law.
>
> "The seaman must obey orders and submit himself to punishment for wilful disobedience. Eldridge v. Atlas S. S. Co., 134 N. Y. 187, 32 N. E. 66. He cannot quit his job without becoming a deserter. Malukas v. Overseas Shipping Co., 197 App. Div. (N. Y.) 224, 189 N. Y. Suppl. 13. Even though the defective appliance is known to the seaman where he ships, he does not assume the risk of injury therefrom, but may rely upon the defect being corrected. Cricket S. S. Co. v. Parry, 263 Fed. 523. In short, a vessel's owner who sails his ships with improper appliances, does so at his own risk, and not at the risk of the seaman. Sec. 33 of the Merchant Marine Act expressly granted to sailors the right of the employees under the federal employees liability act, but the causes of action of seamen are still causes of action under the maritime as distinguished from common law, and must be governed by its established rules."

The court held that Sporgeon was entirely to blame for his accident, and the court said about him: "There is no testimony that any one directed him to select this particular way." (T. 75.) The court must have forgotten the testimony of plaintiff who said, "There was another way of doing it, if the mate would have given me time to rig up the gear." (T. 73.) This is not denied by the mate in all his testimony which appears on pages 63 and 65.

The mate testified:

"I did not direct him to put up the lines, he knows that much himself. I gave him instructions to move it aft, but not how it should be done, he knows that much himself. That was left entirely to him. I did not give him any instructions as to the use of an eyebolt." (T. 64.)

The load that the mate speaks of is a load of planks, 2 by 3 by 2 by 12. (T. 65.) But the load that was actually on the sling when the accident happened was a light load of laths. That was the uncontradicted testimony of all witnesses who saw the accident, and the master of the vessel said: "I would say you could use it (the ringbolt) for discharging a load or two." (T. 50.) "It had been used for that purpose when the laths were put on board," said plaintiff. (T. 73.)

The same said Lauritzen, an eye witness, and a member of the crew. (T. 22.)

Only "experts" who did not see the accident said that the ring-bolt was "not intended for that purpose."

It is not denied that Sporgeon was cursed and sworn at to hurry up. (Testimony of McFadden 64, as well as of plaintiff.) "There was another way of doing it, said plaintiff, if the mate would have given me time." (T. 73.)

The above is not denied by any witnesses. Defendants' witnesses said the plaintiff used a wrong

method, and the court so found, and that was the reason for a directed verdict. But we claim it was error, indeed so great an error it was that a directed verdict in plaintiff's favor would, if asked for and granted by the court, have been proper.

The reason is this:

THAT WHEN A SERVANT, ON SHORE OR ON A VESSEL, IS ACTING UNDER ORDERS, HE DOES NOT ASSUME THE RISK, AND IS NOT GUILTY OF ANY NEGLIGENCE. There is no greater authority on master and servant than Labbatt. In Second Ed. of his work, Master and Servant, Sec. 923, page 2465, Vol. 3, he says:

> "The master's acquiescence in the use of an appliance for some purposes other than that for which it was intended puts him in the same position as if the appliance had originally been furnished for that purpose." (Cases cited.)

Again the same author says:

> "In many cases the language of the court implies that were the injury received in obeying a direct command, all question of assumption of risks is eliminated. and the master must rely solely on the plaintiff's contributory negligence. The rationale of this view is that, by giving a direct command to perform the work, the master takes upon himself the risk which otherwise would be assumed by the servant. In a large number of cases the rule is stated to be that if the servant is injured while obeying a direct command he will not be held to have assumed the risk."

Labbatt, Master and Servant, page 3921, Sec. 1362, Second Ed.

If the plaintiff had known that a bolt which was supposed to hold between 5,000 and 50,000 pounds (T. 62), was so loose that to use the testimony of plaintiff, "that it was just like it slid out," nevertheless under the decision of the case of *Grimberg v. Admiral Oriental Line,* 300 Fed. 619, he did not assume the risk, since a seaman must obey orders. On page 3927, Sec. 1363, Second Ed., Labbatt says:

> "For reasons explained in paragraphs 1207, 1233, it is plain that negligence cannot be predicated of a servant's obedience to an order, where he had no knowledge actual, or constructive, of the dangerous condition to which such obedience would expose him."

The doctrine announced in the case of *Grimberg v. Admiral Oriental Line* (supra), is not a new doctrine. About the assumption of risk, so far as seamen are concerned Labbatt says:

> "On the other hand, it is well settled that no such voluntary quality can be ascribed to their conduct in continuing to expose themselves to abnormal risks which come to their knowledge while their contract is being carried out. The rationale of this exception to the general rule is that they are bound by their shipping articles to strict obedience, that they are subject to severe penalties if they refuse to perform their duties, and that they have not the option, which landsmen are theoretically supposed to possess of abandoning the employment the moment they are exposed to an abnormal risk. Lafourche Packet Co. v. Henderson, 36 C. C. A. 519, 94 Fed. 871."

"Obedience to officers is the necessary law of the ship; disobedience is criminal. The Frank & Willie, 45 Fed. 494."

To the same effect is *Bailey on Personal Injury,* page 403, Sec. 173, and the following cases:

Panama R. R. Co. v. Johnson, 264 U. S. 375;
The Colusa, 248 Fed. 293, 9th C. C. A.;
Lafourche Packet Co. v. Henderson, 94 Fed. 871;
Lynot v. Great Lakes Transit Co., 202 Ap. D. 613, 195 N. Y. Sup. 13, affd. 138 N. Y. 473.

The motion for a directed verdict (T. 73) does not tell us, if the defendants relied on the doctrine of assumption of risk or contributory negligence. Thus says the court:

"There is no testimony that anyone directed him to select this particular way. He did it of his own volition. He could have rigged slings at other places with blocks, to give him the purchase that he desired, that would bring his lines in the orderly arrangement that would be necessary to move his lumber, but instead of doing it, he chose this particular way, and he runs the rope through this ringbolt, that was on the floor of the deck of the ship." (T. 75.)

The testimony of the plaintiff is entirely overlooked by the court. Plaintiff said: "There was another way of doing it, if the mate would have given me time to rig up the gears."

The court said: "He (the plaintiff) could have rigged at other places with blocks."

That is what the court said, but the plaintiff said, and I do not think it was ever controverted as follows:

"After twelve o'clock I went to Mr. Grande (the mate) and said: 'Are there any snatch-blocks on the ship? I can't find any.' He said he would be blessed, if he knowed, he hadn't seen any." (T. 28.)

A block would have reduced the strain 25 per cent. Testimony of Becker. (T. 61.)

The whole testimony of the defense is based on the supposition that the ring-bolt was intended for lashing, especially booms.

But when we remember that the greatest stress that was ever applied on the light load was not more than one twenty-fifth of what it was supposed to hold, we can easily see that the bolt could not even be used for the lashing of a boom, because a boom also has weight. Indeed an ordinary boom will weigh tons, and when the wind blows and throws the ship from side to side, the strain no doubt would be more than 1250 pounds, if it was any boom at all. This ring-bolt just "slid out", said the plaintiff. It was supposed to hold from 5,000 to 50,000 pounds (T. 62), and no doubt 50,000 pounds resistance was calculated to be sufficient in the event that it was used for lashing booms, but we can easily understand that when this slight pull made it come out that it was not in a safe condition for anything.

All "experts" testified that this ringbolt was used for lashing, and not when loading, and it is most remarkable that not one witness on the ship related a single instance when the bolt had been used for lashing, but those on the vessel could show that this bolt had been used for loading.

The witnesses for the defendants all knew what the government intended to use this bolt for, that is they claim they knew, but it looked strong and solid to the plaintiff who did not know that it was not clenched below like all other bolts that he had seen, and he had no time to think, but it was his duty to obey quickly, and it is unjust in the extreme to say that he assumed the risk of something he knew nothing about.

If the gear had not been properly rigged up the mate would not have cursed plaintiff and told him to hurry up. We have no right to reason that the mate, if he had seen that there was something wrong in the way the gear was rigged up, and known that it was dangerous, that he would then hurry the plaintiff. It must be true as the captain said, Lauritzen said, and the plaintiff said that they used this lead for a load or two, a light load.

It is unreasonable to argue that the owner of the vessel has no more duty than to properly rig it up in the first place. His duty is a continuing duty to see that the appliances are safe for the purpose for which they are used on the vessel.

The rule of law is that for defective appliances both the vessel and her owners are liable. It is well stated in 36 *Cyc.* 162, as follows:

> "It is the duty of owners of a vessel, which they owe to persons on a vessel who may be rightly upon or near their vessel and to all who may be affected by her use, to use reasonable care and skill to keep the vessel and her appliances in a reasonably safe condition, and if they fail to do so, they and their vessel are liable for damages caused to person or property by the dangerous or defective condition of the vessel, or of her appliances."
>
> 36 *Cyc.* 162.

35 *Cyc.* 1245 uses this language:

> "But the liability in such cases is incurred only when those who represented the vessel failed to exercise reasonable care to make the fittings or appliances safe. and when the breakage was due to a defect which might with reasonable care have been discovered or remedied."

Now, this defect in the fastening of the bolt which was so loose that it "just slid out" could easily have been discovered by the mate whose duty it was to look out for such matters. Indeed the master knew the manner in which it was fastened, it was not clenched, but only screwed in. The master said: "I knew it was not clamped, and I knew it was screwed down the deck." (T. 52.)

Neither the counsel who made the motion for a directed verdict nor the court classified the act of plaintiff either as contributory negligence nor as assumption of risk. The court said that it was

plaintiff's own fault. Plaintiff "was injured by his own indiscretion." (T. 77.)

We believe that the court was of the opinion that the plaintiff was guilty of contributory negligence rather than of assumption of risk. If his negligence was contributory negligence it was for the jury to determine the amount, or to use the language of the statute, to "apportion" the negligence of each.

Judge Taft, as we will see in the following page, points out a distinction between assumption of risk and contributory negligence. Since there is no such thing as assumption of risk, except ordinary risk, that can be used as a defense against a seaman, we must heartily cite from *Bailey* on *Personal Injuries,* Vol. 2, page 949, what the Supreme Court of the United States says. Their say is law right or wrong, Bailey says:

> "Where an adult was injured while letting himself down from a car, having forgotten that one of the steps was missing, and the court failed to observe any other consideration, as being involved than that of contributory negligence, it was said: 'We are of the opinion that the court erred in not submitting to the jury whether the plaintiff, in forgetting or not recalling at the precise moment the fact that the car from which he attempted to let himself down, was one from which the step was missing, was in the exercise of that degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling and under the same circumstance under which he was placed.' Kane v. Railway Co., 128 U. S. 94.

Assumption of risk as extended to dangerous condition of machinery, premises, and the like, obviously shades into negligence as commonly understood. The difference between the two is one of degree rather than kind. Schlemmer v. R. & P. R. Co., 205 U. S. 127, Sup. Ct. Rep. 407, 51 Law Ed. 681. See also Schlemmer v. Buffalo R. & P. R. Co., 220 U. S. 590, 31 Sup. Ct. Rep. 561, decided May 15, 1911."

We find the following note in Sec. 354, page 949, in Vol. 2 of *Bailey* in his work on *Personal Injuries* where he cites Taft, as follows:

(Note 29.)

"Assumption of risk and contributory negligence are neither identical in effect or co-incident in extent. Assumption of risk is the voluntary contract of an ordinary prudent person to take chances of the known or obvious dangers of their employment, and to relieve his master of any liability therefore. Contributory negligence is the casual action or omission of the servant without any ordinary care or consequences. The one rest in contracts the other in tort. Narramore v. Railroad Co., 96 Fed. Rep. 298, 37 C. C. A. 499, 48 L. R. A. 68."

If all the evidence on the part of the plaintiff is disregarded, as we believe the lower court did, we find this situation: There is no proof of any inspection as to the bolt for years. It was supposed to hold between 5,000 and 50,000 pounds or at least two tons and a half (T. 62), and was pulled out according to the testimony of the defendants' witnesses on a pull of about 2000 pounds, and according to plaintiff, "it just slid out;" this shows negligence

on the part of the owners of the vessel, as even their own witnesses said that this bolt was used for the same purpose as the plaintiff used it. If he was under the Merchant Marine Act, Sec. 33, his case should have gone to the jury. It could not be a case of assumption of risk, as the plaintiff was ignorant of the loose condition of the bolt. Since assumption of risks rest in contract, plaintiff cannot assume that of which he knows nothing, but according to the cases cited from the Supreme Court of the United States the difference between the two defenses are of degree rather than of kind, *Bailey, Personal Injuries,* Sec. 354, page 949.

When Sec. 33 of the Jones Act came before the C. C. A., 289 Fed. Rep. 964, the court also held that assumption of risk was no defense against a seaman when his cause of action grew out of defective appliances on the vessel.

> *Panama R. R. Co. v. Johnson,* Aff. 264 U. S. 375, 68 Law Ed. .

Benedict on Admiralty, 5th Ed., Sec. 83, p. 135 says:

> "The risk of improper appliances furnished by the owner is not assumed by the seaman who is bound to obey orders and the principle is applicable in an action at law as it is in admiralty."

We think the lower court who granted the directed verdict may have been induced so to do by reason of his idea of what the law was with refer-

ence to the care required of a shipowner in regard to appliances on a vessel. The court said:

> "The duty of the owner of a ship is the same as that of any other, that is to say, he must use and exercise ordinary and reasonable care, to make the place and the instrumentalities with which the seaman works reasonably safe." (T. 74.)

But reasonable care in this instance is greater than ordinary care of a landsman. That was overlooked by the court.

Benedict in his work on *Admiralty,* page 135, says:

> "The shipowner is held to a higher degree of care than an employer ashore."
>
> *Storgard v. La France & Canada S. S. C.,* 263 Fed. Rep. 545, certiorari denied, 252 U. S. 585, 40 Sup. Ct. Rep. 394.

The plaintiff, Sporgeon, did not know that the bolt was improperly fastened, and did not assume the risk of such unknown dangers. This is the rule in cases where the railroad employer's liability law applies, as it is well said by Justice Lamar writing the opinion for the Supreme Court of the United States in *Central Vermont Railroad Co. v. White,* 238 U. S. 507, 9 Neg. & Comp. Cases, 265, where it is said:

> "He (the deceased) did not assume the risk arising from unknown defects, engines, machinery, or appliances, while the statute abolishes the fellow servant rule. 35 Stat. 65, No. 2."

The answer of the defendant in the case at bar is well drawn. It sets up two distinct defenses, negligence on the part of plaintiff and assumption of risk. In the second affirmative defense the defendants plead that:

"The plaintiff carelessly and negligently caused 'a line to run through a certain eye-bolt fastened to the deck and then pulled away to the right and at an angle, and by reason of the *failure to use a block in connection with said eye-bolt, said bolt was subjected to an enormous and severe strain, etc.' That there were available plenty of blocks for plaintiff's use had he so elected to use them but he failed and neglected to do so although he knew or should have known that he thereby subjected said bolt to a strain far beyond that which it was intended to bear."* (T. 12.)

The same is repeated by the defendants in the fifth defense as follows:

"The plaintiff was negligent" etc., "in his failure to use a block in connection with the rope running through the eye-bolt." (T. 15.)

These blocks should have been used said the defendants, but they were not available, and plaintiff's testimony must be taken to be true, since it is not rebutted.

The mate's testimony is on pages 63-64 and 65 of the transcript, and not a word is said by which he denies that Sporgeon made a request for a block.

All the witnesses agree that snatch-blocks should have been used, and since these could not be found it is so much more peculiar that the court could say that the accident was simply the "fault of the plaintiff."

From the answer as well as from the testimony we draw the conclusion that plaintiff was held guilty of negligence, because he did not use a snatch-block. If there had been any testimony to the effect that plaintiff by not using the snatch-blocks submitted the eye-bolt to an enormous strain, this would have been no defense under the testimony which was to the effect that the mate did not let him have any. But it is not true that the eye-bolt was submitted to an enormous strain, or even to an ordinary strain, as we have already shown, therefore we would have been entitled to a directed verdict in our favor, if we had asked for it. The worst that can be said against plaintiff is that he was guilty of contributory negligence, but that would not defeat his recovery, neither is it fair to say that his negligence was the sole cause of the accident, especially when the following facts are considered, namely the ring-bolt was loose, and the order by the mate telling plaintiff to hurry up and refusing him the snatch-blocks. It is well said by Hallam in the case of *Otos v. Great Northern R. R. Co.,* 128 Minn. 283, 150 N. W. 922:

> "Defendant contends that the proximate cause of plaintiff's injury was not the defective condition of the coupling, but his violation of a

> rule of the employer forbidding employees to go between moving cars. It appears that there was such a rule. There is evidence that in this yard it had with knowledge of the yardmaster, been more honored in its breach than in its observance. But, whatever may be said of the propriety of plaintiff's act in going between the cars, it was only one of the concurrent causes of plaintiff's injury. The violation of the statute was one cause of his injury. Turritan v. Chicago, St. Paul M. & O. Ry. Co., 95 Minn. 408, 18 Am. Neg. Rep. 506; Sprague v. Wisconsin Central Ry. Co., 104 Minn. 58, 116 N. W. 104. This is all that is necessary to create liability. The statute which abolishes contributory negligence 'would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. * * * It is only when the plaintiff's act is the sole cause—when the defendant's act is no part of the causation, that the defendant is free from liability under the act. Grand Trunk Ry. Co. v. Lindsay, 233 U. S. 42, 34 Sup. Ct. Rep. 581, 582, 58 Law. Ed. 836, Anno. Cases 1914 C. 168, quoting 201 Fed. Rep. 844, 120 C. C. A. 166."

The plaintiff testified that the mate who was the vice principal would not give the plaintiff time to rig it up. This is not denied. There is testimony to show that the plaintiff rigged up the load contrary to custom, but no denial of the fact that in this case plaintiff was acting under orders, he, plaintiff said: "There was another way of doing it, if the mate would have given me time to rig up the gears." (T. 73.)

A snatch-block was refused the plaintiff.

All witnesses testified that a snatch-block should be used. The captain said: "If you had a snatch-block on a bolt, this would eliminate a certain amount of the strain on the rope itself." (T. 51.)

Witness Becker for the defendant worked it out mathematically, the reduction of stress an ordinary snatch-block would have caused. (T. 60.) It would have reduced the stress 35 per cent. (T. 62.)

The "deck-department" was left to the mate to take care of. (T. 70.) It is impossible to find any trace of any negligence on the part of the plaintiff, but the record is replete with facts showing negligence on the part of those who represented the vessel. Some of the facts are:

(1) Want of inspection about the bolt;

(2) Refused to give plaintiff time to rig up the lines;

(3) Refusing him a snatch-block.

But the mate said:

"I did not direct him how to put up the lines, he knows that much himself. That was left entirely to him. I did not give him any instructions as to the use of an eye-bolt. I did not see any of the operations of moving this lumber aft."

This is no denial of the fact that he was cussing and swearing because the lumber did not come fast enough. (T. 46.) Neither does it deny the fact that this mate refused plaintiff a snatch-block. (T. 29.)

The following is a note we find in *Labbatt, Master and Servant,* Second Ed., page 4804, Sec. 1582:

> "The master cannot escape liability upon the ground that the negligent methods were adopted by a fellow servant, where the superintendent was present a sufficient length of time before the accident to have made a change of methods. Hamann v. Milwaukee Bridge Co., 127 Wisc. 550, 106 N. W. 1081, 7 Ann. Cas. 458."

We have already seen that a seaman must obey orders and that the doctrine of assumption of risk and contributory negligence does not apply in such cases.

This ring-bolt became so loose that according to plaintiff's testimony it "just slid out" and according to the most favorable testimony on behalf of the defendant it should have stood a strain of from 5,000 to 50,000 pounds. Thus said witness Becker for the defendant:

"Looking at this bolt, the defendant's exhibit 1, it is a ⅞ inch bolt, in good material or a straight pull that bolt would hold about 50,000 pounds, at least two tons and a half." (T. 62.)

Just imagine the idea of accusing plaintiff to be at fault for submitting such a bolt to a weight of between 1200 and 2000 pounds. The very fact that this bolt became loose, if it was not already loose, shows negligence on the part of the mate whose duty it was to look after the deck-department. (T. 71.)

In *Heinz v. Knisely Brothers,* (1914) 185 Ills. Appellate Court 275, the court says:

> "From the fact that the rope broke, the jury might properly find it was not strong enough to withstand the strain put on it, and that the weakness of the rope manifested itself by the 'fuzzy' condition."

In our case a witness, Mr. Becker, who was called as a witness for the defendant testified:

"The bolt might turn, if the stress on the line was sufficient, not with short leverage, but it might with a long leverage. If force was sufficient it might finally come out by itself." (T. 63.)

Any person can understand that a bolt with no nut or other appliance to keep it from coming out, will, when hit by lumber finally come out. The threads itself when turned will cause it to be loose. (T. 63 and the court's opinion T. 76.)

It was such a bolt that the captain on the vessel admitted that it could be used. He said:

"I would say you could use it for discharging a load or two like he (plaintiff) did."

The master says "LIKE HE DID." It is no wonder that the mate did not object when plaintiff was using it for a light load, but on the contrary "came around, and cursed and swore at the second mate (plaintiff) because the lumber did not come fast enough." (T. 46. Testimony of McFadden.) The court said: "And if plaintiff took a chance and injured himself." (T. 77.) The mate used "them

particular ringbolts." (T. 28.) Therefore the statement of the court that the plaintiff "took a chance and injured himself" is not supported by proof.

The master of the vessel said on cross-examination: "If the bolt had had a nut below, or was clamped below, I am sure that it would have been more safe, perfectly safe so far as the bolt was concerned. I never told Sporgeon that this bolt was not clamped below the deck, because the bolts were never used for that purpose. * * * I did not tell Sporgeon where he could find the snatch-blocks." (T. 52.)

But this is contradicted first by the captain himself who said: "I would say you could use it for discharging a load or two, like he did" (T. 50), second by witness Lauritzen (T. 22), third by plaintiff who said: "They used those ringbolts loading" (T. 27, last line), fourth by Moriarity: "If it (the bolt) was available for that—time is a factor, and you make it fast to anything. You certainly would" (use it). (T. 43.)

The chief officer testified and could have denied this, if it was not true.

Witness Lauritzen who was the winchdriver and called by the plaintiff although he was originally a witness for the defendant said:

"Q. And saw them use this particular bolt in many places the same as it was used at that time; it was nothing unusual?

A. They usually lead the way it will lead best.

Q. And at the time, fastened the way it was, you took it for granted it was like any other bolt on the ship?

A. Yes, sir." (T. 22 and 23.)

Witness Becker for the defendant said:

"I found ringbolts of such nature; they are placed in pairs, and the impression I got of them was that they were there to secure booms at some *previous time.*" (T. 57.)

Mr. Becker says also as follows:

"You never use it (this kind of bolt) where there is an opportunity for a transverse pull, unless it is used in connection with a pie plate bolt." (T. 56.)

But he says: "Providing the lashing attaches to the bolt in such a way that you have a strain along the axis of the bolt, never have a transverse strain, that is of any magnitude." (T. 57.)

The same witness said: "If the force was sufficient it might finally come out by itself." (Becker's testimony T. 63.) There seems to be some contradiction in the above, because no force is necessary when it would come out by itself. The witness means that, if enough of these transverse pulls, it would work loose and come out by itself. It stands to reason that ninety per cent of all pulls and hits were transverse pulls, even if used only for fastening booms, because a vessel is moved sideways on account of the waves, and if struck by lumber it

would likely be hit sideways. In other words this bolt was sure to work loose, because not clenched.

This shows how exceedingly dangerous it to have a screw that has no nuts or is not clenched below deck. It happened that the pull when the plaintiff used the bolt was a straight pull. "It was pulled straight out," said witness Lauritzen. (T. 20 and 21.) It was just such a straight pull by which the bolt was supposed to hold between 5,000 and 50,000 pounds. (T. 62.)

Any person who has seen a lumber schooner loaded knows that there is lumber everywhere, lumber below, and lumber on deck. It is impossible to avoid hitting matters, such as bolts when lumber is discharged or loaded on. These hits and the continual transverse stress would tend to work out any lag screw, and since the master on the vessel knew that it was simply screwed down, and not clamped, he should have let plaintiff know that it was not clamped below deck. This he did not do. (T. 52.)

We can easily see that the reason for a directed verdict was the court's opinion in the following statements:

> "The construction of them (the ringbolts) would render them unsafe for that purpose (for loading and unloading). Every witness who has testified in this case has testified that it is bad seamanship for anyone to make use of the ringbolts for the purpose for which the plaintiff devoted them, because they are liable to turn or screw out and the friction is likely

to tear them loose, as was done in this case." (T. 76.)

The above, more than anything else, shows the dangerous character of the bolt. Therefore, if the plaintiff had known that they were not clamped below, and if he had had time to rig up the lines, and if he had not been refused a block, he would have been almost entirely to blame for the negligent manner of fastening the ring-bolt.

The judge was mistaken when he said: "Every witness who has testified in this case has testified that it is bad seamanship for any one to make use of the ringbolts for the purpose which the plaintiff devoted them." (T. 76.)

The court must have forgotten the following testimony. An old seaman, eye-witness Lauritzen said:

"Q. You have been a winchdriver for several years?

A. Yes sir.

Q. And saw the use this particular bolt in many places the same as it was used at that time; it was nothing unusual?

A. They usually lead the way it will lead best."

Witness Ainsworth for the plaintiff said: "One could not tell by looking at it, except from below, if this bolt was clinched under the deck. If a person sees a bolt of that size on the deck, they would use it for the purpose for which it would be necessary to use a bolt of that size." (T. 40.)

Witness Moriarity for the plaintiff said:

"Judging from the size of it I would moor the courtroom to it." (T. 43.)

"I would not consider it good seamanship to use a bolt without using a block." (T. 44.)

This shows again that when the mate refused the plaintiff a block that the mate was not following "good seamanship." This is so much more important considering the fact that it was the mate's duty to look after the deck-department. (Testimony of the managing owner, Mr. Mahoney.) He said:

"The mate would have to know if the bolts and screws were not in shape. He has charge of the upper end and reports that to his superior officer. * * * I told no one to look after these bolts." (T. 71.)

The court said:

"The difficulty with the plaintiff's case is that he has used the appliances intended for one purpose for another purpose."

The court is mistaken in the above. This vessel was not an ordinary vessel but it was one built in the war time when everything was built in a hurry. Without contradiction plaintiff testified:

"She was one of those war-time-built vessels. * * * the winch was level with the keel." (T. 27.)

Mahoney, the managing owner said:

"The vessel was built on the Pacific Coast, and sold to the French government during the war, and I bought it back for delivery in New York."

It is not reasonable that any person can be absolutely certain as what these bolts were intended for. Since the vessel was built during the war, it was built in a hurry. If it was built by the government, President Wilson was thinking more of the Kaiser than of a seaman. If it had been built under the direction of "The Railsplitter" he would have intended it to be safe for a seaman, but neither the college president nor Lincoln would place a bolt on a vessel that seemed to hold fifty thousand pounds when as a matter of fact it held next to nothing.

It cannot be that any person knew what this bolt was intended for, and the judge was greatly mistaken in relying on experts on that point and disregarding the testimony of the seaman who knew what it was used for.

The actual pull on the bolt that was supposed to hold from 5,000 to 50,000 pounds, at the time it "slid out" is calculated as follows:

The load weighed about 1000 pounds (T. 32), by not having the snatch-block it increased the pull 35 per cent. (T. 62.) The whole pull did not exceed 1350 pounds. The legal principle showing that such condition is negligence is well stated in

> *Duran v. Yellow Aster Min. Co.,* 40 Cal. Ap. 633.

The complaint alleged that a certain rope furnished by the defendant for plaintiff's use "was insufficient in size, weight and strength to sustain and hold the weight of a dump-car." The rope broke

and by reason thereof the plaintiff was injured. The court in its opinion says:

> "The evidence is undisputed that a new rope of the size and quality used is good for four thousand pounds dead weight on a vertical lift * * * it was stipulated that the weight of the truck and running gear of the car was one thousand six hundred pounds, and the weight of the bed independent of the running gear and truck was about one thousand two hundred pounds, making a total weight of two thousand eight hundred pounds. * * *"
>
> "There does not appear to have been any close inspection of the rope before it was used."

It appears that the rope broke under a strain of 2800 pounds when it was supposed to lift 4000. That in connection with the fact that a cut was shown in the rope was sufficient to let the case go to the jury, and the court says:

> "The rule is affirmed that when a thing which causes the injury is shown to be under the management of the defendant, and the accident is such, as in the ordinary course of things does not happen, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care."

In the case of *Pacific-American Fisheries Co. v. Hoof,* the libelant was a watchman on a vessel and as he was in the act of stepping from the upper deck of the vessel to the lower he was injured because the cleats had been removed and the ladder slipped. Rudkin, C. J., wrote the opinion of the court (291 Fed. 306). The court says:

> "The duty of the master to provide a safe working place is a continuing one, and cannot be delegated. When the working place and appliances are unsafe it is no answer to say that they were rendered unsafe some previous time as already stated, the duty is a continuing one, and notice of the defect and danger will be imputed to the master where they could have been discovered by reasonable inspection, and by the exercise of reasonable care."

The court says in his opinion (T. 77): "The owner couldn't guard against it." Of course that was left to the mate, and Mr. Mahoney has so many vessels that it would be utterly impossible for him to do that in person. But the testimony shows how easy the mate and master could have guarded against it. The master knew the bolt was not clenched but screwed to the deck. (T. 52.) This he could have ordered changed before the accident, but it was changed too late, after the accident. (T. 47.) They all knew that it was liable to "turn or screw out and the friction is likely to tear them loose, as was done in this case." This is also from the court's opinion, and note how very easily these matters could "have been guarded against." (T. 76.)

Witness Moriarity said:

"A bolt like that, if the deck is wet, with such awful small threads wouldn't have any hold at all, but this cannot be told from the way it was screwed in." (T. 43.)

The above shows that the court was right when he said:

"Because they are liable to turn and screw out and the friction is likely to tear them loose, as was done in this case." (Judge Bourquin, T. 76.)

The winchdriver said: "It did not seem to be fresh material, you cannot expect it to be exactly like new, because the water is bound to seep in and weaken it from 1917 to 1924, seven years."

In the case of *Osterholm v. Boston and Mont. C. Copper Co.,* 107 Pac. 499, 40 Mont. 508, the servant knew the condition of the cage that was alleged to be defective and caused the injury because it did not comply with the statutory requirement. Judge Bourquin who tried the case in the lower court ordered a directed verdict in favor of the plaintiff because he believed that as a matter of law the doctrine of assumption of risk did not apply, and that it was not a matter for the jury. When the case came to the Supreme Court of Montana that court reversed Judge Bourquin and said:

> "If, upon this latter question, different men of fair sound mind might draw different conclusions then the question must be submitted to the jury." (Citation from page 506 Pac. Rep.)

The court goes on and says:

> "In the case of Rase v. Minneapolis, St. Paul & P. S. S. M. Ry. Co., supra, Mr. Justice Jaggard said: 'It is clear that his appreciation of the risk was for the jury. He had no special occasion to animadvert to the possible danger. He had done his usual work with safety under the same condition. No peril necessary confronted him' etc. We think it was error to

> hold him to have assumed the risk as a matter of law, because as Ryan, J., said in Dorsey v. Construction Co., 42 Wisc. 583: 'The consequence of acquiescence ought to rest upon positive knowledge * * * of the precise danger assumed, and not on vague surmise of the possibility of danger.' "

Judge Jaggard, a great authority seems to take notice of the fact that the plaintiff had done his usual work with safety under same condition. In the case at bar, the mate did just as the plaintiff and used these bolts. (T. 28.)

In the case of *Schroeder v. Mont. Iron Works,* 38 Mont. 474, 100 Pac. 619, a chain broke because it was not large enough to hold the weight. Its size could be seen by the plaintiff who was injured by using it as well as by the defendant who had furnished it. Judge Bourquin who tried the case held that here was a clear case of contributory negligence as well as of assumption of risk, and he ruled against Schroeder and would not let the case go to the jury. A complaint, setting out that the chain was "insufficient in size did not state a cause of action, said the judge. The Supreme Court of Montana did not agree with Judge Bourquin on that point and the court speaking by Justice Brantley said:

> "Where a large number of men are employed upon the same work, it is essential that reasonable orders, regulating their conduct and assigning to them proper places in which to work, should be given. It is the duty and the right of the master to give orders and direct the

places where his servants shall work. Their duty is instant and absolute obedience, unless it is obvious to them that such duty will expose them to unusual dangers. * * * A workman, when ordered from one part of a work to another cannot be allowed to stop, examine and experiment for himself, in order to ascertain if 'the place assigned to him, is a safe one'. This may with equal propriety be said of the appliances furnished by him to the servant. It is the master's duty to use ordinary care to furnish his servant with reasonable, suitable and safe appliances. The servant has a right to presume that this duty has been observed, hence his duty is to yield instant obedience in the use of them, and he will not be held to have assumed the risk of any unusual danger incident to such use, unless he knew of it, or it is so obvious that he must be presumed to have observed it."

"Knowledge of the size of it would not imply such additional information."

In the case at bar the defendant will also argue that Sporgeon stood on the wrong side of the rope, and that this was negligence. So it would have been, if Sporgeon had known that the rope might break. About such a position standing under a chain that breaks the same court (*Schroeder v. Mont. Iron Works*) says:

"Nor does this allegation justify the conclusion that he was guilty of contributory negligence in going near enough to the suspended casting to release the chain in order to complete the task assigned to him. If the chain had been of sufficient strength, it would not have broken. Plaintiff had a right to assume that it would not break."

The court reversed Judge Bourquin.

Reading the opinion of the Hon. Judge who tried the case of Sporgeon, we can easily see that he had the identical same idea at this time as he had in 1909.

We submit that the view that Justice Brantly took in the *Schroeder* case and Judge Rudkin in the *Hoof* case, is more just and humane. Not more than ten months ago this court held in *Petterson v. Hobbs-Wall & Co.,* 2 Fed. (2nd S.) 549, that even, if the testimony given by plaintiff may be hard to reconcile, still it should be left to the jury. Judge Dooling said in *"The Colusa,"* aff. 241 Fed. 968, that even if a defect in a turnbuckle was not obvious, it could have been discovered by the use of reasonable care. In support thereof *"The Fullerton,"* 167 Fed. 1, was cited. In *Carrado v. Pedersen,* 249 Fed. 165, Judge Dooling said when a man rope gave way, that safety lies only in frequent inspection. He says:

> "The shipowner's duty is positive and non-delegable to see that the ship is seaworthy and that her equipment is in condition for safe use."

In *"Santa Rosa",* 255 Fed. 231, Aff. 249 Fed. 160, the pulley and chain was not in good working order, it was held to be negligence, citing *"The Osceola,"* 189 U. S. 158.

In *Cricket Steamship Co. v. Parry,* 263 Fed. 523 a rope was not fit for use, held that the owners were liable.

> "Where the evidence offered by the plaintiff is reasonably sufficient to substantiate the claim of plaintiff, it is error to reject such evidence and direct a verdict for the defendant." Syllabus to the case of Cooper v. Spring Valley Water Co., 171 Cal. 158, 153 Pac. 936.

The right to grant a directed verdict is the same as the right to grant a non-suit. *Caspar Est. of,* 172 Cal. 147, 155 Pac. 631.

The court said in his opinion that plaintiff only was to blame, and the reason for this opinion was mostly the way plaintiff rigged up the gear and the fact that he used no snatch-blocks. As we have seen plaintiff "had no time to rig up anything" (T. 73), and he was refused snatch-blocks (T. 29), but if plaintiff's testimony could be eliminated nevertheless it should have gone to the jury. In the case of *"Joseph B. Thomas,"* 81 Fed. 578, Judge Morrow held that to negligently place a keg so near the hatch that it would be liable to fall down the hatch at any time was negligence. The vessel's owners are liable no matter who caused it to fall down the hatch. The principle here in the Sporgeon case is the same, because to place a screw in the way they had it in the deck, so it might "finally come out by itself" (T. 63) is a great deal worse than placing a keg near a hatch. A keg can be seen and avoided. This bolt looking like it might be strong enough to "moor the courthouse to it" (T. 43) was an unseen danger. Judge Morrow says in the *"Joseph B. Thomas"* case:

> "It is a well settled rule that the owner of a vessel owes a general duty to all employed on board that the vessel shall be reasonably safe against accidents or dangers to life or limb."

In *"The Drummelton,"* 158 Fed. 454, a cleat was not sufficient and by reason thereof an engine cover fell over the libelant and injured him. The court said that such a cleat was unsafe and made the vessel not seaworthy, no matter if it was defective when the ship was built or if it became so by the negligence of the crew. This says the court is a duty of the shipowner and is within the exception in *"The Osceola."* .*"The Osceola,"* 189 U. S. 158, 47 Law Ed. 760, 23 Sup. Ct. 483. In *Alaska Packers S. S. Co. v. Egan,* 202 Fed. 868, Judge Gilbert speaking for the court says that the negligence to furnish a safe place in which to work on a vessel when loading and unloading, is a hazard not necessarily assumed. Judge Taft in the *Narramore* case, 48 L. R. A. 68, is also holding that the negligence to furnish a reasonably safe place in which to work is not assumed. We are all familiar with the exception in cases where a man is on land, and the exception is that if the servant knows about the dangerous condition that risk is also assumed.

The respondent will likely argue that Sporgeon could have used block, and that the court had a perfect right to consider that Sporgeon's testimony should be ignored when he said that he could not get any. These blocks were provided just for such work. Judge Hughes speaking for the Supreme

Court had to deal with just such a contention in the case of *Atlantic Transportation Co. v. Imbrovek,* 234 U. S. 52, 59, Aff. 193 Fed. 1019. Justice Hughes says:

> "It is urged that the neglect was that of a fellow servant, and that hence, the petitioner was not liable. Both courts below, however, concurred in the finding that the petitioner omitted to use proper diligence to provide a safe place in which to work."

The judge who tried this case was of the opinion that the duty of an employer on land was the same as on sea, and he said:

> "The duty of a master of ships is the same as any other owner—or of the owner of the ship, is the same as any other employer of labor, that is to say he must use reasonable care to make the place and the instrumentalities with which the seaman works reasonably safe." (T. 74.)

The Fifth C. C. A. say in the case of *Lafourche Packet Co. v. Henderson,* 94 Fed. 873-875:

> "Without discussing the law as in the authorities cited, we are of the opinion that it is not applicable to the case at hand. There must be a different rule as to the risk assumed by a seaman on board the ship from the rule as to the risk assumed by a servant on land."

Judge Wolverton says in *"The Aurora",* 178 Fed. 587, Aff. 191 Fed. 961:

> "It is a bounden duty of the employer to furnish the employee with a safe place to work."

Judge Wolverton says that a workman is not supposed to stop and examine, if the place is safe. He

says just as Judge Brantley speaking for the Supreme Court of Montana, in the case of *Schroeder v. Mont. Iron Works* (supra), in which Hon. Judge Bourquin said the same thing as he has said in the *Sporgeon* case, that is, that a servant assumes risk of a defective appliance.

This court in affirming Judge Dooling in *"The Colusa"*, said:

> "The ordinary rule which applies to assumption of risk by a workman is not applicable to the case of a seaman on board a ship, as he has not the privilege of using his own judgment or of quitting the ship's service, if he apprehends the danger."

The citation is from the syllabus to *"The Colusa"*, 248 Fed. 21. To the same effect is *Benedict on Admiralty,* 5th Ed. Sec. 133, page 202, and also *Panama R. R. Co. v. Johnson,* 289 Fed. 964, Aff. in 264 U. S. Rep. 375, 68 Law. Ed. ....

This shows that the duty of a shipowner is entirely different to the duty of a master employing servants on shore. To the same effect is *"The Fullerton"*, 9th C. C. A., 167 Fed. 1.

We think the court made a mistake when it disregarded all plaintiff's testimony as to what was a safe method of fastening a bolt in the vessel. Witness Becker said when he was called for the defendant that "if the force was sufficient it might finally come out by itself." It is difficult to understand how this can be a safe bolt when it might "come out by itself." Very likely the jury would

have believed the plaintiff's witnesses, and would have found that such a way of fastening a bolt was unsafe, as "it might come out by itself, if the force was sufficient", and the court found that the bolt the way it was fastened "was liable to turn and screw out and the friction is likely to tear them (the bolts) loose, as was done in this case". (T. 76.) That is what the court said in directing a verdict.

Any person can see that even for the use of fastening a boom, such a bolt was dangerous. Since it was the duty of the defendants to have safe appliances, it is clear that if the bolt was so badly fastened "that it might come out by itself", was a good reason for a verdict for plaintiff and no reason at all for a verdict for the defendants, unless the law was that the plaintiff assumed the risk of a dangerous appliance.

We submit the following:

(1) Having a loose bolt that looked like you might moor the courthouse to it, so strong did it look (T. 43), but was so weak that it was liable to come out by itself (T. 76), was negligence on the part of the mate who represented the shipowners, and it was not negligence on the part of plaintiff to use it.

(2) If all the evidence given by the witnesses for the plaintiff is entirely ignored, and the evidence given by the defendants is taken as true, in such

event the "fault" as the court terms the acts of plaintiff are contributory negligence and does not come under the doctrine of assumption of risk.

(3) If the plaintiff was guilty of contributory negligence it was for the jury to "apportion the damages according to the negligence of each."

Dated, San Francisco,
October 28, 1925.

Respectfully submitted,
S. T. HOGEVOLL,
Attorney for Plaintiff in Error.

No. 4586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

16

OSCAR SPORGEON,
Plaintiff in Error,
vs.
ANDREW F. MAHONY, et al.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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BRIEF FOR DEFENDANTS IN ERROR.

PRELIMINARY STATEMENT OF THE CASE.

This is an action for personal injuries asserted by the plaintiff to have arisen from the failure and neglect of defendants to keep the steamer "John C. Kirkpatrick" and her appliances in a reasonably safe condition. The particular neglect of duty charged in the complaint is that the defendants failed to exercise reasonable care that a certain bolt "was so fastened that the same would resist an ordinary pull for which said bolt was intended." It is further alleged that the bolt was loose and dangerous "on account of the manner in which it was fastened to the deck and on account of

the rotten condition of said deck'' and that while a winchman was pulling on a rope which was fastened to the bolt, it was pulled out and the rope to which it was fastened struck the plaintiff and caused the injuries on account of which the suit is brought.

The answer denies all negligence specifically and generally and sets up several affirmative defenses, namely, that the injury arose solely through the plaintiff's own negligence, that the defendants exercised reasonable care in providing a safe place to work, that plaintiff assumed the risk and that plaintiff was contributorily negligent.

For the sake of clarity we think it advisable to summarize briefly the facts developed upon the trial, reserving a more detailed analysis of the testimony for later discussion. The following is a brief narrative of uncontradicted facts:

On August 14, 1924, the steamer ''John C. Kirkpatrick'' was lying at the dock at the port of San Pedro, California. The crew and certain longshoremen were engaged in discharging a portion of her cargo of lumber. Plaintiff, who was second mate of the vessel, was in charge of the after end of the ship. It was desired to unload some cargo from the hold. In order to do this it was necessary to move from off the top of the hatch a number of bundles of laths which were not destined for discharge at that place. The first mate directed plaintiff to have these laths moved, and then went to the forward part of the vessel. He

did not specify the method whereby this should be accomplished—this being left entirely to plaintiff's own judgment. The cargo was to be moved from the hatch back to the forward end of the poop-deck. On the poop-deck is a windlass or capstan which can be used for moving cargo. In order to bring the load back to the desired spot without the necessity of moving the booms, plaintiff caused a line to be fastened to the top of the load which was suspended by the falls, and instead of merely taking this line around the heavy rolling chock or the bitts which were on the vessel for the purpose of feeding a line to this after capstan, plaintiff ran the rope back from the load through a ring-bolt screwed to the deck near the forward end of the poop, then caused the line to carry over sharply to the right, and then around the chock whence the line wound around the after spool of the capstan or windlass. A rough sketch of the after deck appears on page 36 of the transcript. The plaintiff was standing in the bight or angle of the line between the ring-bolt and the lead or chock, directing the operation. While the load was being heaved aft the ring-bolt pulled out of the deck, and the line straightening out suddenly threw the plaintiff back against some bitts, causing the injuries complained of. The evidence showed that the ring-bolt was not designed for the purpose of moving cargo at all, but was there for the purpose of lashing booms or lashing cargo to the deck, or for stopping lines. After hearing the evidence, the court, upon motion of defendants, directed the jury to return

a verdict for defendants. Judge Bourquin's summary of the case in addressing the jury is found at page 74 of the transcript.

This cause is now before this court upon a writ of error brought by plaintiff who contends that the court below erred in granting the motion for a directed verdict. Plaintiff in error and defendants in error respectively will be designated herein as plaintiff and defendants.

In support of our contention that the action of the court was proper, we propose first to review briefly the salient features of the testimony, after which will follow a discussion of the law applicable. Lastly, certain contentions of plaintiff relative to alleged negligence on the part of the mate will be dealt with.

Before, however, taking up the main body of the discussion, we desire to invite attention to the authorities discussing the rules covering the direction of verdicts in the federal courts.

RULE AS TO DIRECTED VERDICTS.

Plaintiff in his brief quotes Rule 93 of the Rules of the District Court, which of course governs the situation. This rule, however, does not require in order to make a directed verdict proper, that the evidence be entirely without conflict. The law is thus stated in

3 Foster, Federal Practice, (6th ed.) p. 2420:

> "A verdict should be directed in two classes of cases: where the evidence is undisputed, and where,

although there may be a slight conflict it is so conclusive in favor of one party that the court would feel obliged to set aside a verdict against him."

And in

Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 83 Fed. 437, 440,

Judge Sanborn expresses the rule in the following language:

"The judges of the national courts are not required to submit a question to a jury merely because there is some evidence in support of the case of the party who has the burden of proof; but, at the close of the evidence, it is their duty to direct a verdict for the party who is clearly entitled to it, when it would be their duty to set aside a verdict in favor of his opponent, if one were rendered. At the close of the evidence there is always a preliminary question for the judge, before the case can properly be submitted to the jury; and that question is not whether there is literally no evidence, but whether there is any substantial evidence, upon which the jury can properly render a verdict in favor of the party who produces it. *Commissioners of Marion Co. v. Clark,* 94 U. S. 278, 284; *North Pennsylvania R. Co. v. Commercial National Bank of Chicago,* 123 U. S. 727, 733, 8 Sup. Ct. 266; *Delaware, L. & W. R. Co. v. Converse,* 139 U. S. 469, 11 Sup. Ct. 569; *Laclede Fire-Brick Manuf'g Co. v. Hartford Steam-Boiler Inspection & Ins. Co.,* 19 U. S. App. 510, 515, 9 C. C. A. 1, 4, and 60 Fed. 351, 354; *Gowen v. Harley,* 12 U. S. App. 574, 585, 6 C. C. A. 190, 197, and 56 Fed. 973, 980; *Motey v. Granite Co.,* 36 U. S. App. 682, 686, 20 C. C. A. 366, 368, and 74 Fed. 155, 157."

See also

Missouri Pac. Ry. Co. v. Oleson, 213 Fed. 329;
Chicago, St. P., M. & O. Ry. Co. v. Kroloff, 217 Fed. 525;
Fricke v. International Harvester Co., 247 Fed. 869,

to the same effect.

It is the contention of the defendants herein that upon a review of the record in this case it will become apparent that plaintiff produced no evidence and certainly no substantial evidence upon which the jury could properly have rendered a verdict in his favor.

THE RECORD DISCLOSES NO EVIDENCE OF NEGLIGENCE ON THE PART OF DEFENDANTS.

1. It is not disputed that the ring-bolt was not intended to be used for the purpose of moving cargo.

The implement asserted to be defective by plaintiff in his complaint is the ring-bolt which pulled out of the deck when plaintiff used it for the purpose of heaving a line through it. The difficulty, however, with plaintiff's case is that the undisputed evidence shows that the ring-bolt was not intended to be used for this purpose at all. This is not denied by plaintiff and is affirmatively admitted by plaintiff's witness, Andrew Aezer, who was the shipwright that was called to repair the boat. This witness testified as follows (Tr. p. 48):

> "I see that kind of bolt every day; it is used for lashing the booms or for a stop for the lines. Such a bolt is not used for hoisting cargo around the deck, it is not intended for that, they should not use it for that purpose."

Captain Halvorsen testified (Tr. p. 50):

> "It is not intended to be used in connection with handling lines at all. I don't presume it was put in the ship for that purpose. I have never seen it used for that purpose on board the ship. This was the first time I had seen it so used."

H. Cleaver, former mate on the "John C. Kirkpatrick" testified also in this connection to the same effect (Tr. p. 53):

> "I have served two years as chief and second mate on the 'John C. Kirkpatrick;' that was in 1922 and 1923. I recall these ring-bolts located in the forward end of the poop-deck; they were there for the purpose of lashing the boom, and I never saw them used for any other purpose."

All the testimony shows that the method adopted by plaintiff in using this bolt for the purpose of moving cargo was not only improper, but dangerous. Captain Lancaster, master mariner for twenty-two years, testified as follows (Tr. p. 55):

> "It shows very poor seamanship to move a load of laths from the forward part of the vessel by running a line through that ring-bolt and then around the lead, and then around the windlass. By leading a 'rope yarn over a nail' there is caused so much friction in the ring-bolt, if the line carried away, not only would it be endangering the winch-driver on the after-deck, but the line on the rebound would kill somebody at the winch and

the cable. The ring-bolts were placed there to lash the boom down, the old booms, before the new booms were put on; they were so long they had to build a chock to rest the boom on and rest it over the bitts, necessitating an entirely new deck arrangement for lashing booms. From the appearance and position of these bolts it would be apparent to anybody that knows seamanship that they are not to be used for moving cargo, because they are not proper bolts in deck construction.''

We also quote from the testimony of Archibald L. Becker, a consulting engineer and shipbuilder (Tr. p. 57):

> ''They (the ring-bolts) could not be used as a lead to a windlass for the reason that an ordinary snatch-block hooked into either of these rings would not bring the line fair to the spools of the winch, without a pennant intervening between the ring and the snatch-block. In my opinion the location of those bolts would indicate instantly to an expert seaman that they were not designed in connection with pulling cargo, because the balance of the equipment on the ship would give an illustration to even an ordinary seaman that those things were much below the standard of requirement for the purpose of handling cargo. The appearance of them as constructed would be alone sufficient to indicate that they were not there to be used for that purpose; also with reference to the location this applies.
>
> Q. Now, Mr. Becker, supposing in moving a load of laths from over the top of the hatch to some place further aft on this vessel, a line should be run from the top of the hook, through this ring-bolt to the deck, you have just told us about, and then to the right around the lead or chock, and into the windlass, would that, in your opinion, be a proper

method for accomplishing that result?

A. Well, that would be the height of folly, to use the ship's equipment in that way, by passing that manila line through that solid ring-bolt.

Q. Why?

A. Because it would wear the line out, if nothing more, and destroy the equipment. Furthermore, in passing the line through there, and if there was a great stress on there, the intensity of pressure on that ring-bolt against the line would have a tendency to part the line. If the line parts with a strain on it, then the result is that the end flies against the operator of the winch, or else the whole load goes back, and swings into the rear house, and endangering the men there. It is the height of folly to pass a line through the solid eye of a ring-bolt, both from an economical standpoint and a technical standpoint.

Q. In your opinion, is that a proper use of that ring-bolt either with or without a snatch-block?

A. It is not, because the ring is not installed in a way to resist a transverse strain."

In fact, plaintiff's action in running this line through the ring-bolt is not attempted to be defended by plaintiff's own witnesses. Captain Ainsworth said (Tr. p. 41):

"No bolts are put in for the purpose of putting lines through it."

And Mr. Moriarity testified (Tr. p. 44):

"I would not consider it good seamanship to use a bolt without using a block."

And finally, plaintiff himself said on cross-examination (Tr. p. 38):

"By running this line through this bolt, I was subjecting the rope to quite a lot of wear, and if the

> rope carried away, it would have hurt the men back of the hatch."

In the light of the foregoing, it certainly could not be successfully contended that the bolt was being used at the time in the manner in which it was intended to be employed.

2. There is no evidence of any custom or practice obtaining for the use of this bolt for the purpose of moving cargo on the vessel.

Apparently realizing the futility of attempting to prove that the ring-bolts were being used properly at the time, plaintiff attempted to show at the trial that the bolts had been used for moving cargo on prior occasions. Laying aside all questions of variance between pleading and proof, and also of the legal sufficiency of such proof to make out a cause of action, we desire to call attention to the state of the record on this subject.

The plaintiff testified that the ring-bolts were being used by the chief officer and the third officer in loading the vessel (Tr. p. 28). While this is denied by the captain, who testified that he was present during the loading, and that neither these ring-bolts nor any ones like them were used in connection with the loading of the cargo (Tr. p. 51), we recognize that the plaintiff's statement must be taken as true, for whatever it may be worth, in determining the correctness of the court's ruling in directing the verdict for defendants.

The plaintiff, however, had been on the vessel for over two months (Halvorsen, tr. p. 50), and all he testifies to

is that on *one occasion* prior to the accident, the bolts were used in connection with the discharge of cargo.

That is the only testimony in the record as to any previous use of the bolts for the purpose of moving cargo.

The witness Lauritzen does not testify that the bolt was ever used at all for the purpose of moving cargo. He does not testify, as plaintiff claims in his brief (p. 11) that

> "I saw them use this particular bolt in many places the same as it was used that time."

An examination of the transcript at the reference cited by counsel (Tr. p. 22) shows that counsel is attempting in his brief to put into the witness' mouth what he would not say at all.

On the other hand, Mr. Lauritzen's testimony is positive and unequivocal to the effect that *this was the first instance he had ever seen* of a bolt being used like the one involved in the present case was employed at the time of the accident. We quote from his direct examination (Tr. p. 21):

> "I do not know if I have ever seen an eye-bolt used like this one was used; I suppose it was used to get the best lead aft."

And again from his redirect examination (Tr. p. 23):

> "Q. You never saw a bolt used like this before this time for that purpose, did you?
> A. I could not say exactly that I have because I never,—I could not say that, not a bolt like that. There are so many different kinds of bolts on a ship. I don't remember seeing one used like that for that purpose before."

The witness Cleaver, who was on the vessel two years prior to the accident testified that he never saw the ring-bolts used in connection with moving cargo around the deck (Tr. p. 53). Likewise Captain Halvorsen, who had been on the vessel a little over a year, testified that he had never seen the bolt used for the purpose of moving cargo before the present instance (Tr. p. 50).

There is moreover, no evidence whatever that the defendants had any notice or knowledge of the existence of any such practice, even assuming that it existed at all.

3. It is not disputed that the ring-bolt was of proper and customary construction for the purposes for which it was put into the vessel.

The record shows that while a lag screw, such as is employed in this case would not be a proper instrument with which to move cargo, it is an entirely proper and customary appliance for the purpose of lashing booms or cargo, or for stopping lines. Plaintiff's witnesses all agree to this.

Ainsworth (Tr. p. 41):

> "I have seen bolts of this kind used for lashing booms, very frequently, it is common construction. The bolt is quite satisfactory for lashing cargo or booms to the deck."

Moriarity (Tr. p. 43):

> "I have seen bolts of this kind used to lash down booms with on deck."

Aezer (Tr. p. 48):

> "I see that kind of bolt every day; it is used for lashing the booms or for a stop for the lines."

Of course, defendants' witnesses testify to the same effect.

Captain Halvorsen (Tr. p. 50):

> "A bolt of this kind is a common thing on board such vessels. It is used for lashing down of booms, for stopping of lines, that is what it in most instances is used for."

Cleaver (Tr. p. 53):

> "These bolts are commonly used on steam schooners; screwed to the deck, and used to lash booms with, and for lines and so forth, to keep lines from washing overboard. Life-boats are lashed down with it."

Lancaster (Tr. p. 54):

> "I have seen the ring-bolt on the forward part of the poop-deck. They were placed there to lash the old booms down with. That is absolutely proper and usual construction on vessels of that sort. It is proper and customary to put lag screws in for that purpose. Time and again I have seen that done in steam schooners."

Becker (Tr. p. 57):

> "I consider a ship properly equipped when it has lag screws for the purpose of lashing down the booms. I have inspected the 'John C. Kirkpatrick'. I found ring-bolts of such nature there; they are placed in pairs, and the impression I got of them was that they were there to secure the booms at some previous time. I noticed that they had put a new chock on the deck, and had moved

the booms out more, and raised them up, and I assume that the eye-bolts were used for that purpose before this addition or change was made. At this time, I see that they can be used for lashing tanks, or some bulky load that the ship might take on deck. They could be used for lashing the booms in their present location, but, of course, if the booms were stowed away there, the long booms they have there would interfere with the handling of the lines, and that was probably the reason for moving the booms outward.''

Finck (Tr. p. 57):

''A ring-bolt is used for stoppers for lines, for mooring lines, it is sometimes put there to make the booms fast.''

It is submitted that the foregoing leaves no doubt as to the purpose for which the bolts were put into the vessel and the propriety of their construction for this purpose.

Parenthetically it might be noted also that plaintiff utterly failed to produce any testimony that the bolt was not suited for the purpose for which it was put into the vessel, namely, lashing booms or cargo or the like, or that it was not in good condition for such use. His own witness Aezer, completely negatived his charge that the deck was in a rotten condition. Mr. Aezer was the man that replaced the bolt in question and consequently was in a position to know exactly the condition of the deck. His testimony in this connection is very significant (Tr. p. 48):

''The wood did not indicate that it had been torn, *and it was perfectly sound and there was no*

> *indication of rottenness.* The bolt is screwed into the deck and there is no chance of any leakage, and no water could get in down over that screw."

4. Proper equipment was provided for the purpose of moving cargo around the deck.

The testimony conclusively shows that it was not necessary to use this ring-bolt at all to accomplish the task that plaintiff had to do. The evidence shows that on the vessel were good substantial bitts and a heavy rolling chock built for the purpose of feeding lines to the windlass in order that cargo could be moved to any part of the vessel desired. The plaintiff himself admits that these appliances were properly and solidly constructed (Sporgeon, Tr. p. 39).

> "The heavy rolling chock is built right into the ship, it was properly secured in good working order, and so solid that you would have to pull out the deck in order to pull it out. I do not know if the bitts were of wood or steel, but they were fastened to the ship, of good solid construction."

Captain Halvorsen (Tr. p. 51):

> "Other methods can be used to move the cargo back, that will accomplish the same result as speedily and effectively. You can take it through the lead, that is to the gypsy head, and you can pass it round; there is two leads, one on each side, especially put on the deck for that purpose; these leads are built right into the deck and by using them you can put the cargo on any part of the ship you want."

Mr. Becker (Tr. p. 59):

> "I am familiar with the proper usage of a ship's equipment, and I have accomplished the same re-

sult of moving that load aft in several ways. A good way would be to take two lines, one to each spool around the rolling chocks that are provided there on the ship, and start the winch and throw either starboard or port side, and land it where you wanted to. The other way is to take the wood, tie it fast to the lead, put a snatch-block on the load, pull it back with the quarter chock, go ahead with the winch, and then load it wherever you want to. The latter way would not involve any more work than the other way I have mentioned, neither would it involve the expenditure of any more time, because the last way I outlined would not make it necessary to pass the end of the line through a solid eye, and overhaul it. That method would not be technical and obscure to a licensed seaman; they are all familiar with either way that I have described; either way would accomplish the result. The method I have described, or the equivalent, would be followed by a man having in mind the safety of the ship, and he would never resort to the sort of method as was followed here."

Mr. Cleaver, as stated, was on the vessel for nearly two years and was in charge of the after-deck for some thirteen months. During all of that period he had no difficulty in using the ship's equipment regularly provided for the purpose of moving cargo (Tr. p. 53):

"I never saw them (the ring-bolts) used in connection with snatch-blocks or otherwise, in moving cargo around the deck. I had charge of the operations of discharging cargo on the vessel for thirteen months, and nearly every trip we moved cargo from the forward part of the ship to the poop-deck. We had fair leads for that purpose, stationary on the vessel. The rolling iron-chock is stationary on the ship and to take it out you

> would have to take practically the whole deck. It is easy and simple to move the cargo by that means alone. That is the way we did it before. I would not run a line through that ring-bolt and around this lead, over to the windlass, nor would I see other men do it either. It would not be safe, the rope will give way, if there is no fair lead, if there is no snatch-block in the ring-bolt."

Certainly it cannot be contended that there is any conflict on the proposition that it was not necessary to use this ring-bolt to accomplish the result desired.

5. It is not disputed that plaintiff himself was in charge of the work and selected his own method of using the ship's equipment.

It must be borne in mind that plaintiff was not an ordinary seaman but was a licensed officer, in charge of the after-part of the vessel. There is no contention made that plaintiff himself was not superintending the work at the time, or that anyone directed him to use the ship's equipment in the manner in which he did. On the contrary, all the testimony is that plaintiff was in complete charge and free to choose his own method of accomplishing the task he had to do. Indeed, plaintiff admits that he was in charge (Sporgeon, Tr. p. 37).

Other uncontradicted testimony by both plaintiff's and defendants' witnesses is to the same effect.

D. McFadden (Tr. pp. 44, 46):

> "The second mate superintended the job * * * two sailors were in charge and they were taking orders from the second mate."

Lauritzen (Tr. p. 21):

> "The second mate had charge of the work on the after deck; I do not know where the first mate was, the first mate was looking after both ends; he had charge of the whole thing, and the second mate had charge of this particular operation."

Grande (Tr. p. 64):

> "Sporgeon had charge of the after end of the ship at that time. I gave him orders to see that different orders came aft. There was a load to be hauled aft and away from some other lumber that had to come out first. I gave him instructions to move it aft, but not how it should be done. I did not direct him how to put up the lines, he knows that much himself. That was left entirely to him. I did not give him (any) instructions as to the use of an eye-bolt. I did not see any of the operation of moving this lumber aft. I was in the other end of the ship then. I first heard of the accident an hour afterwards, when the winch-driver told me about it."

It thus appears that the plaintiff was in full charge of the operations and had the power and authority to choose any method of doing the work that he saw fit, and that he chose and employed the particular method employed here entirely of his own volition.

6. Even if the bolt were loose, which does not appear, it was the plaintiff's duty to inspect it.

Plaintiff has misquoted Mr. Mahony's testimony in connection with the routine employed on the vessel in the inspection of equipment. Mr. Mahony testified that anything wrong on the after-part of the vessel would

be within the jurisdiction of the *second mate.* It is quite obvious from the context that this is what is meant (Tr. p. 71).

> "If anything was wrong on that deck, the after end, that would be under the second mate. The mate would have to know if the bolts and screws were not in shape. He has charge of the after end, and reports that to his superior officer."

When the witness in the foregoing testimony says the "mate" he of course refers to the second mate, and not the chief officer, as plaintiff contends in his brief. Therefore if anything were wrong on the after end of the vessel, plaintiff himself would have been responsible.

The point, however, is not of great importance in our opinion as the record is devoid of any evidence that the bolt was not in entirely proper condition with reference to the purposes for which it was installed in the vessel.

THE LAW APPLICABLE TO THE SITUATION DEVELOPED BY THE EVIDENCE IS CONCLUSIVE AGAINST PLAINTIFF'S RIGHT TO RECOVER.

1. Defendants' obligation to furnish safe equipment is limited by the requirements of the purpose for which the equipment was furnished.

An examination of the authorities conclusively demonstrates that defendants cannot be held accountable for

plaintiff's injuries in this case, arising as they did, from the plaintiff's action in putting the ship's equipment to uses other than those for which they were intended. The general rule is thus stated in

> *3 Labatt's Master & Servant,* (2d ed.), p. 2457, Sec. 921:
>
> "A general principle which is frequently conclusive against the servant's right to maintain an action is that the master's duty in respect to his instrumentalities is restricted to seeing that they are reasonably safe for the performance of the functions for which they are designed.
>
> In most of the cases in which this principle has been applied, the justice of admitting such a qualification of his liability is too obvious to be open to question. Thus, it would clearly be unfair to require him to answer for an injury, where the emergency which tested the quality or capacity of the instrumentality arose out of an occurrence which implied no culpability on his part. The same may be said of those decisions the essential presented feature of which is that the plaintiff or a coemployee caused the injury by putting some part of the plant to an absolutely improper use. 'Although it is a master's duty to use due care to furnish his servants tools and appliances suitable for the purpose for which they are provided, he owes them no such duty when they put his tools to uses for which they were not intended.' It is 'not negligence to omit a precaution applicable only to a situation which did not in fact exist.' It is universally agreed, therefore, that an employer is not liable where the servant's injury was not caused by any defect in the appliance which affected its safety when it was used in the ordinary manner and for the purposes for which it was intended."

See, also,

26 Cyc., 1149:

> "Where the place of work machinery or appliance was reasonably safe and suitable for the purpose for which it was intended, a servant cannot hold the master liable for personal injuries resulting from its inappropriate, unauthorized, unnecessary, careless, improper or unusual use or test."

A great many cases dealing with the subject are collected in a note in

16 L. R. A. (N. S.) 984,

the opening paragraph of which summarizes the rule as follows:

> "The courts are unanimous upon the proposition that, if a servant uses a machine furnished by his master, for a purpose other than that for which it was intended, and which was never contemplated by, or known to, the master, the servant takes the risk of all injuries arising from such use, and cannot hold the master liable therefor."

This principle has been applied by the courts universally.

In

Fanjoy v. Seales, 29 Cal. 243,

the owner of a building was held not liable to plaintiff, a workman who engaged in painting the same, suspended a staging from a cornice that gave way. There was no proof that this cornice was designed for the purpose of supporting staging, nor of any general custom of painters so to use them. Mr. Justice Currey held that the court properly instructed the jury

> "that if the cornice and wall, though defective in construction, were still sufficient for the purposes for which they were designed but were applied by the plaintiff on his own responsibility for purposes requiring greater strength than those for which they were intended, and their fall was in consequence of such application, then no negligence or breach of duty could be imputed to the defendant on account of any such defect in their construction."

Similarly in

Gribben v. Yellow Aster Mining etc. Company, 142 Cal. 248, 75 Pac. 839,

it was held that a miner could not recover for an injury sustained by him in using a rope to descend into a shaft where it was shown that the rope was put there for the purpose of drawing gravel up and where a proper ladder had been provided. The same rule is applied in

Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124.

Here a servant was employed in a malt room, and having an endless towel over his shoulder, which impeded him in his work, he threw it over a projecting end of a shaft about six feet above the floor, the end of which had been battered by hammering so that its edges were jagged and rough. The engine started and the plaintiff, attempting to remove the towel, was caught by the shaft and injured. It was held that the master was under no obligation to make the machinery suitable for a purpose not designed and that a nonsuit should have been granted.

In

Hahn v. Chicago, M. & St. P. Ry. Co., 196 N. W. (Minn.) 257,

a directed verdict for defendant was held proper in an action for personal injuries arising out of the act of plaintiff in getting off a moving locomotive and stepping upon the top of a housing box designed to protect the machinery of a signal tower from exposure to the elements. It was claimed that the defendant was negligent because this so-called platform was not level, that it was slippery, unlighted, and that defendant had failed to warn plaintiff of its unsafe condition. Some evidence was introduced tending to show that some of defendant's switchmen at times had gotten off of moving trains on this housing as if it were a platform. In sustaining the action of the lower court in directing a verdict for defendants, the court uses the following language:

> "The housing for the machinery was built for that purpose, and was not in any way recognized by the company as an alighting place. The housing is a mechanical contrivance of a proper type of construction for the purposes for which it is maintained. If it may be said to have caused injury to appellant, it is only because of his attempt to use it for an improper purpose. It is the duty of the company to see that such instrumentalities are reasonably safe for the performance of the functions for which they are designed. An injury arising out of the improper use of the instrumentality does not justify an inference of negligence. It would be unfair and unjust to require the company to answer for an injury, where the emergency which tested the quality or capacity of the instrumentality arose out of an occurrence which implied no culpability

on its part. Labatt, Master and Servant (1st Ed.), Sec. 26. Such instrumentalities are in the class of switch posts, rails, and other things in and about railroad tracks which render particular places unsafe for alighting; but that does not show negligence on the part of the company.

The record shows that the company did not direct this housing to be used as a platform, and it at no time had any reason to expect that appellant would so attempt to use it. The appellant seems to have imposed upon this instrumentality a new function; namely, that of a platform which the company never contemplated. We find that there was no violation of duty on the part of the company, and that the record fails to disclose actionable negligence upon which appellant may maintain this action. The trial court was right in directing the verdict and in denying the motion for a new trial."

A directed verdict for defendant was likewise approved in the case of

Roberg v. Houston & Tex. C. R. Co., 220 S. W. (Tex.) 790.

This was an action for damages resulting from the death of one of defendant's employees, an experienced foreman, caused by the breaking of a chain used to hoist a wrecked car from the track. It was found, however, that an adequate supply of chains had been given the servant, but that he himself, picked out one that was too light for the purpose to which it was put. The defendant was held not bound to anticipate that an extraordinary or unusual strain would be put upon the appliance in question and was held not liable for any failure in making an inspection of the chain, the evidence indicat-

ing that had a test shown the chain to have been in perfect condition, it still would have been insufficient to sustain the weight of the load put upon it.

In

Manche v. St. Louis Basket and Box Company, 262 S. W. (Mo.) 1021,

an employee stepping on a platform furnished and used for moving material only was held precluded as a matter of law from recovering for injuries sustained when the board broke. At the close of the case the court directed a verdict for the defendant, which was affirmed upon appeal. It was held that plaintiff by his own choice used the platform for a purpose other than that for which it was furnished or intended, and that he was not entitled to recover damages for injuries sustained by reason of such use, even though the platform was defective in fact, when tested by the use to which he put it. It was further held that it was not necessary for defendant to plead contributory negligence as the record disclosed no actionable negligence at all on the part of the defendant, and that this was so, whether the negligence charged in the complaint was in furnishing an unsafe appliance or in failure to furnish a reasonably safe place to work.

Nor can the defendants here be held in anywise at fault by reason of the mere fact that the ring-bolt in question was located in a position where it could be used improperly as the plaintiff used it here. The bolt was not improperly placed with reference to its intended purpose. Nor was it even conveniently located for

the purpose to which plaintiff put it. The only evidence on this subject is that it was so situated as to indicate by its position that it was not designed for the purpose of feeding a line to the windlass as it would not bring the line fair to the spools of the winch (Becker, tr. p. 57; Lancaster, tr. p. 55).

But even on the assumption that it was so located that it could easily be used improperly, no liability is thereby created. This principle is thus expressed in

> *3 Labatt's Master & Servant,* (2d ed.), p. 2463:

> "The mere fact that an appliance happens to be placed where it can be used for the performance of the work which the injured servant undertook to do with it does not warrant the inference that the master intended that he should use it as he did, or the inference that he was in fault in not knowing that he was likely to do so. Any other rule would involve the consequence that every master who leaves any implement upon his premises, which his servants cannot safely use for every purpose which suits their convenience, sets a trap for them."

The case of

> *Morrison v. Burgess Sulphite Fibre Co.,* 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634,

cited in the text, is directly in point on this proposition. The syllabus in the report concisely summarizes the case:

> "An elevator shaft ran up through a mill at an angle of 45°, its sides being covered with canvas. Plaintiff, an employe, was engaged in hoisting a large beam to the top of posts in one of the upper stories, and near the elevator shaft. There was some obstruction on the top of one of the posts, and

> plaintiff stepped onto the canvas covering to raise himself to a point where he could remove the difficulty, and his weight burst the canvas and precipitated him into the shaft. The canvas was covered with dust and chips, and was not distinguishable from ordinary boarding, and plaintiff thought that it was a solid surface. *Held,* that the employer was not liable for injuries resulting to plaintiff therefrom, as the elevator shaft was not intended for the purpose to which plaintiff put it, and he stepped thereon at his peril."

Answering the contention that defendant was at fault in not anticipating that a servant was likely to step upon the canvas by reason of its location, the court says:

> * * * "If the fact that the elevator happened to be where he could stand on it and do his work was evidence either that the defendants intended for him to use it as he did, or that they were in fault for not knowing that he was likely to do so, every master who leaves any implement upon his premises which his servants cannot safely use for every purpose which suits their convenience, regardless of that for which it was provided, sets a trap for them. In that event the master's duty in this respect is not limited to using ordinary care to furnish his servants with tools and appliances which are suitable for the purpose for which they are provided, but it is his duty to furnish such tools and appliances as his servants can safely use for any purpose which suits their fancy."

2. The defendants cannot be held to have acquiesced in the improper use.

It will be recalled that the only testimony in the record concerning the alleged use of these ring-bolts for the purpose to which plaintiff put them prior to the accident

in question, is the plaintiff's testimony that they were used in loading on that day. It has been pointed out that on the other hand the testimony shows that the captain and the former mate for three years last past had never seen the equipment so used on any previous occasion. Nor is there the slightest pretence of any evidence that defendants themselves were aware of the misuse of the equipment or that there was any general custom so to use it from which such knowledge could be presumed. It is true that as an abstract proposition the master's acquiescence in the use of an appliance for some other purpose than that which it was intended puts him in the same position as if the appliance had been orignally furnished for that purpose. But there is no evidence of such acquiescence in the present case. As is said in

3 Labatt's Master & Servant, (2d ed.), p. 2465:

> "But the mere fact that an appliance had been diverted to new uses before the accident in suit will not render the master liable, if that diversion occurred without his knowledge or consent. Nor is an occasional improper use of an appliance, not in pursuance of a recognized custom, sufficient to render the master liable on the ground of acquiescence. Nor will negligence be imputed to an employer of experienced men, so as to render him liable for injuries sustained by them, because he permits them to relax his regulations or disregard his general instructions or advice, when they choose to do so for their own convenience and with knowledge of the risk."

The cases cited by the author amply support the text.

Sievers v. Peters Box and Lumber Company, 50 N. E. (Ind.) 877,

was a case where plaintiff's employee was injured in

using a freight elevator to ride upon. It was shown that the elevator was designed to carry freight exclusively and not passengers. It was shown that it had been used by employees on the first day it was operated. It was held that this would not make any difference, in the absence of proof of knowledge of the defendant and an affirmative showing that it acquiesced in such use of the elevator.

And in

Teetsel v. Simmons, 34 N. Y. Supp. 972,

plaintiff was injured by stepping upon a switchboard which was not designed to be used as a platform. It was shown that it had been occasionally used by the workmen for that purpose, but it was not proved that such use was in pursuance of any custom or by any authority of the master. It was held that the plaintiff being injured by an improper use of the equipment could not recover against the master.

Indeed it has been held that where the servants were experienced men and are, or should be, fully aware of the risk involved, no negligence can be imputed to the master simply because he permits the servants to use the appliances improperly, when they choose to do so for their own convenience and with full knowledge of the risk.

The Persian Monarch, 55 Fed. 333.

Here the plaintiff, a foreman stevedore, injured by an improper use of a derrick rope which imposed a greater strain upon it than it was intended to bear, was held not entitled to recover against the vessel, even

though the respondent knew of the practise of so using these ropes; it being shown, however, that proper equipment and appliances were in fact furnished.

It is submitted that no further citation of authorities is necessary to show that plaintiff has not made out a case of acquiescence by defendants in the improper use to which the ring-bolt in question was put.

3. Defendants were not obliged to instruct plaintiff in the proper performance of his duties.

The plaintiff testified (Tr. p. 26) that he had been a mariner for thirty years, that he was at the time of the accident forty-seven years of age, that he served in the Navy during the Spanish-American War, after which he had been an officer on merchant ships, had another period of service with the Navy during the World War and since 1919 had served as officer and master of merchant ships. In the face of this it is difficult to see how it could be reasonably contended that defendants were obliged specifically to instruct plaintiff as to how every appliance and instrumentality on the vessel was intended to be used. Certainly in the situation defendants would have a right to assume that plaintiff would know the proper use of the vessel's equipment and would devote it to no other purpose. Negligence cannot be imputed to a person by reason of a failure to avert or avoid a peril that a reasonably prudent person would not have anticipated. After an accident has happened, it may be possible to suggest methods by which it might have been avoided; but

that of itself does not prove, nor even tend to prove, that reasonable or ordinary care would have anticipated or provided against it. If authority is needed in support of a proposition so elementary, reference could be made to

> *3 Labatt's Master & Servant,* (2d ed. p. 2756, Sec. 1042),

and also to p. 2765 of the same work (Sec. 1047).

This principle is aptly illustrated in a case in the Northern District of California,

> *McKenna v. Union Steamship Company,* 215 Fed. 284.

This was an action for personal injuries sustained by a seaman, which the evidence showed arose from libelant's choosing an unsafe place from which to oil the steering gear. It was argued that the vessel owed him an obligation to instruct him in his duties. In answer to this contention Judge Dooling says:

> "I cannot agree with libelant that there was any obligation on the part of the libelee to instruct him in his duties, or in the way to perform them. He shipped as an able-bodied seaman. He is 33 years of age, has been going to sea since he was 14 years old, and has been for 13 years sailing up and down this coast. His is not the case of a minor, nor of one whose lack of experience on board ship would cast upon his employer the duty of instructing him in the method of performing the work which his position called for. On the contrary, the employer was entitled to believe that he fully understood all his duties, and if in fact he did not so understand them the

obligation was cast upon him to seek information, and not upon the ship to furnish it unsought.

The fact that he selected a dangerous place from which to oil the steering gear, when there was an absolutely safe place provided for that purpose, does not argue negligence on the part of his employer, unless, indeed, the employer were bound so to close this place that libelant could not enter it at all, a proposition which cannot seriously be maintained. It is indeed, unfortunate that libelant suffered the severe injuries for which he brings this action; but, in the absence of negligence on the part of the libelee, he cannot recover."

Similarly in

The City of St. Louis, 56 Fed. 720,

a deck-hand on a steamer was ordered to paint the smoke-stack, and misunderstanding the directions given him, he placed a ladder weighing about eighty pounds against the smoke-stack which broke it off and the libelant fell, sustaining serious injuries. It was held that the accident was due to the libelant's own ignorance and that he was not entitled to recover damages.

As is said in

Nash v. Wm. M. Crane Co., 125 N. Y. S. 987, 990,

"Is it necessary that the master having supplied proper materials and a proper place to work, shall follow each and every employe around a factory to see that he makes a proper and safe use of the materials furnished? We think not. The master had done his full duty in the premises in furnishing a reasonably safe place in which to

> work and reasonably safe tools and appliances and if the plaintiff, heedless of his surroundings made an improper use of the place and the appliances, the defendant is not to blame."

It is apparent therefore that no liability can be predicated upon the claim that defendants failed to tell plaintiff expressly that a ring-bolt, designed for lashing purposes, was not intended to be used for hauling cargo around the deck.

THE ALLEGED NEGLIGENCE OF THE MATE CANNOT BE CONSIDERED, AS IT IS NOT WITHIN THE ISSUES.

It will be remembered that the complaint proceeds merely upon the theory that defendants failed in their duty to exercise ordinary and reasonable care—that a certain bolt would resist an ordinary pull—*for which said bolt was intended.*

Upon the trial of the case plaintiff attempts to prove that the mate was negligent in not finding him a snatch-block and also in hurrying plaintiff so that he did not have time to rig up the equipment properly. It is submitted that it cannot be seriously argued that a plaintiff can bring an action based upon alleged defective appliances, and then recover on the ground that a fellow servant was negligent in forcing plaintiff to use an appliance for a purpose other than that for which it was intended. Here is certainly a fatal variance between pleading and attempted proof. A great many authorities could be marshaled in support of

this proposition. We shall, however, content ourselves with the citation of a few cases which on their facts are quite analogous to the present case.

In the

Frank D. Stout, 276 Fed. 382,

a case decided by this court, libelant sued for personal injuries, claiming that the vessel was responsible in supplying an unsafe sling, made of wire instead of a chain. After a decree for the claimant the libelant appealed and among other contentions claimed that the evidence showed that the hook was defective as well as the sling. Judge Hunt disposes of this contention in one sentence (p. 385):

> "No basis for recovery can be made on account of the length of the hook, because there was no claim of that kind pleaded * * *."

The case of

Roberg v. Houston & Tex. C. R. Co., 220 S. W. (Tex.) 790,

cited supra, is directly in point on this proposition. The case, it will be remembered was under the Federal Employers Liability Act, the basis of the complaint being that a chain supplied by defendant was not strong enough to be used for hoisting purposes. It was proved at the trial that plaintiff himself selected the particular chain. It was then contended that defendant was at fault in not plainly marking the chain so that it could be distinguished from others which were in fact

strong enough. The court discussing this contention says (p. 794):

> "It is true that the evidence shows that the lifting capacity of a seven-eighths inch chain of this kind is a matter of expert scientific knowledge and could have been ascertained by the railroad company and the chain marked so that any one using it would be informed of the maximum weight it could lift or carry with safety. If the failure to so *mark the chain could be held to be negligence on the part of the railroad company, such negligence was not alleged in the petition, and therefore appellant could not recover on this ground.*" (Italics ours.)

The case of

> *Gregory v. Chicago, M. & St. P. Ry. Co.*, 42 (Mont.) 551, 113 Pac. 1123,

is also precisely in point. In this case plaintiff brought an action alleging that an appliance furnished by defendant for the purpose of removing heavy machinery from a car was not reasonably safe for such work. The testimony showed that the equipment itself was proper, but there was some evidence that defendant's superintendent ordered the machine to be started without allowing plaintiff time to get out of danger. The court, however, permitted the case to go to the jury, presumably on the issue of unsafe appliances and the jury returned a verdict for the plaintiff. The appellate court reversed the judgment and directed the lower court to enter judgment for the defendant. With reference to the contention that the superintendent was

negligent in making a premature order the court has this to say (p. 1127):

> "The order of Long may have been premature, but this is not alleged as negligence, and is not within the issues: so that there is a divergence between the issues tendered by the complaint and the evidence that it cannot be said that plaintiff has proved in substance the cause of action alleged. Hence the conclusion is inevitable that the verdict is not justified by the evidence."

In

De La Mar v. Herdeley, 157 Fed. 547,

the same rule is applied. There it was held that where a complaint is based entirely upon a specific ground of negligence the jury cannot properly find for plaintiff, as the negligence alleged was not proved, even if the evidence tended to show another and different act of negligence. The court on this subject says (p. 549):

> "While the courts are liberal with respect to variances between the allegations and the proof, the rule still exists that a plaintiff, to recover, must substantially prove the material allegations of his complaint. A plaintiff cannot be permitted 'to raise issues for the first time by the evidence or to recover upon an issue other than related in the pleadings'. *Santa Fe, etc., R. Co. v. Hurley,* 4 Ariz. 258, 36 Pac. 216; *Wagner v. N. Y. & St. L. R. Co.,* 76 App. Div. 552, 78 N. Y. Supp. 696. *Heller v. Donellan* (Sup.) 90 N. Y. Supp. 352. Any other practice would fail to apprise a defendant of the demand he is called upon to meet, and a judgment would afford little protection against future recoveries for the same cause, because it would be impossible to tell upon what ground it was rendered."

In

Richards v. City Lumber Company, 101 Miss. 678, 57 So. 977,

under a declaration alleging injury to a servant by the breaking of a defective belt and failure to furnish safe appliances, it was held that plaintiff could not recover upon showing breach of duty by the superintendent in failing to direct him how to handle the machine. Likewise in

Graves v. Metropolitan St. Ry. Co., 175 Mo. App. 337, 162 S. W. 298,

it was held that a petition in a servant's action for injuries from the fall of a ladder on which he was at work charging negligence in failing to put a guard at or near the ladder will not support a verdict for the plaintiff on a theory developed by the evidence that the foreman negligently failed to perform that duty.

The same principle has been applied universally:

Louisville & N. R. Co. v. Hall, 193 Ala. 648, 69 So. 106

(in an action under the Employers Liability Act, plaintiff is confined to proof of the negligence specified in the pleading).

Emmert v. Electric Park Amusement Company, 193 S. W. (Mo. App.) 909

(the employee cannot rely on negligence of the employer which he has not pleaded).

Charlotte Harbor and Ry. Co. v. Truette, 81 Fla. 152, 87 So. 427

(plaintiff confined to the issue of negligence set out in the complaint).

Louisville & N. Ry. Co. v. Wright, 217 S. W. (Ky.) 1016

(a fireman based his complaint on alleged negligence of the engineer; case submitted on issue of defective appliances; held reversible error).

No useful purpose would be served in further elaborating on this well settled rule.

And this very case is a striking illustration of the necessity for such a principle. In the present case plaintiff alleges unsafe place to work and defective appliances, and makes no charge of negligence of fellow servants in his complaint. Defendants are obliged to take the deposition of the chief officer, who being a seafaring man, cannot be produced upon the trial. This witness was called for the purpose of proving that plaintiff himself was in charge of the work, the witness testifying that he was at the other end of the ship when the accident occurred and he did not hear of it until about one hour afterwards. Then at the trial plaintiff attempts to prove that the mate did not tell him where he could find a snatch-block and also that he hurried him so that he could not set up the equipment properly. On top of this plaintiff has now the temerity to claim in his brief that these allegations

were not denied by the chief officer! Certainly here would have been a gross miscarriage of justice if plaintiff had been allowed to go to the jury on the issue of the mate's negligence, raised for the first time upon the trial, no inkling of which claim is contained in the complaint.

EVEN ACCEPTING THIS EVIDENCE, PLAINTIFF WOULD STILL NOT BE ENTITLED TO A VERDICT.

As has been pointed out it would have been entirely improper for the court below to have allowed the case to go to the jury on allegations of negligence not pleaded. But an examination of the record shows that even accepting plaintiff's claims at their face value and even erroneously assuming that the jury would have been entitled to consider this evidence, plaintiff still would not have made out a cause of action upon any theory.

It is first contended that the mate was negligent in failing to direct plaintiff where he could find a snatch-block. The plaintiff also testified that he looked for a snatch-block and could not find one. The captain testified there were three on the ship at the time. Plaintiff, one of the mates, certainly might well be required to know where to find one after two months on the vessel. Let us nevertheless, assume that plaintiff was not at fault, and that no block was immediately available. It is true that had a snatch-block been used in connection with the ring-bolt the strain put upon it would have been materially lessened and in all probability the accident

would not have happened. The testimony, however, is clear that the ring-bolt was not supposed to be used in handling cargo at all, either with or without a snatch-block. Had a snatch-block been interposed, the use of the ring-bolt might conceivably have been justified as an emergency measure, but without a snatch-block, every witness in the case is unanimous in condemning the plaintiff's folly in attempting to run a line through this bolt in the manner in which he did. The fatal difficulty about plaintiff's contention in this connection is that there were proper facilities provided on the ship for the movement of cargo, which did not require the use of a block. Instead of using such appliances, plaintiff urges his inability to find a snatch-block as an excuse for employing another portion of the vessel's equipment in an entirely different manner from that in which it was supposed to be used. In other words the situation is this:

1. A safe means of moving the cargo was provided, namely, with the fair leads or bitts.

2. Employing the ring-bolt for the purpose without a snatch-block was shown to be an absolutely indefensible practice.

3. Had a snatch-block been used, the use of the ring-bolt might conceivably have been justified.

In the above situation how can any reasonable man be heard to contend that even assuming a snatch-block was not available, an experienced licensed officer is entitled deliberately to choose an unsafe method of doing work in preference to the safe method provided by the employer?

Plaintiff himself, however, realizes that this position is entirely untenable and therefore attempts to take refuge in the assertion that the mate did not give him time to rig up the gears. In his testimony in rebuttal, plaintiff announces for the first time that he attempted to use the regular fair leads first, but that the rope jumped off. He assigns as a reason for the use of the ring-bolt that he had to hold the rope down. This contention, we desire to point out, comes out for the first time on rebuttal, after defendant's testimony had made it apparent to plaintiff that he had to explain his failure to use the regular equipment on the ship, or that his case was lost. Then appears the significant statement (Tr. p. 73):

> "There was another way to do it if the mate would have given me time to rig up the gears."

Without waiving our contention that this claim is entirely outside the issues, and cannot be considered, we think it can be demonstrated that plaintiff's own testimony shows it to be entirely without merit. In the first place it is hard to understand how it can be successfully contended that the desire on the part of the mate to have the work accomplished in a hurry would excuse the man who had full charge of the after end of the vessel from taking reasonable precautions, not only for his own safety, but for the safety of the men under his direction. It must be remembered that no one directed plaintiff to use the ship's equipment in the particular manner in which plaintiff employed it. But be that as it may, it clearly appears from plain-

tiff's own testimony that he had plenty of time to rig up the lines in any way that he wanted, even assuming that it would have taken more time to have done the job properly than to have misused the ship's equipment in the manner in which he did. Plaintiff testified (Tr. p. 26):

> "about *eleven o'clock* in the morning *on my end of the ship,* the chief officer, Ole Grande, came to me and said, 'Well, this afternoon, Mr. Sporgeon, you will have the longshoremen remove the laths from the hatch aft and amidships'. We had about three carloads of laths, covering fore and aft midships of the hatch. These had to be moved in order to get about twelve thousand feet of lumber out in the morning in another place, while the men were there."

He testified that he immediately looked the situation over to decide what he would need to accomplish this task. On his own statement it was after *one o'clock* when the work actually commenced (Tr. p. 28). On cross-examination he admitted that the maximum time that it would have taken to rig up the equipment properly would have been fifteen to thirty minutes (Tr. p. 38).

Thus on his own testimony plaintiff has demonstrated how untenable is this claim that he was crowded for time. He admits over two hours from the time he received the order to the time when he started to carry it out and claims that it would have taken at most fifteen to thirty minutes to put the equipment in proper condition. Certainly he cannot now be heard to say

that he misused the appliance only because the mate did not give him time to do the work properly.

CONCLUSION.

We believe there can be no doubt that the court properly directed a verdict for defendants, and that there is no merit in this appeal. The record is utterly barren of any evidence of negligence on the part of the defendants and shows convincingly that the unfortunate accident in this case arose entirely from plaintiff's own misuse of equipment.

It is respectfully submitted that this Honorable Court can take no other view of the situation and will without hesitation affirm the judgment of the court below.

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Dated, San Francisco,
November 14, 1925.

No. 4586

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OSCAR SPORGEON,
Plaintiff in Error,

vs.

ANDREW F. MAHONEY et al.,
Defendants in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff in error respectfully submits that facts as set forth by the defendants in error are so misleading that it is necessary for the plaintiff in error to contradict the same. Since the facts are in dispute we must file a reply brief in order that the court may be able in a quick manner to determine which one is correct.

Fact 1. The defendants in error say on page 3 of their brief:

> "The evidence showed that the ringbolt was not intended for the purpose of moving cargo, but was for the purpose of lashing booms or lashing cargo to the deck, or for stopping lines."

The court can get the best idea of the matter by reading the following statement which was made by

witness Ainsworth on page 40 of the transcript. He says:

> "The ringbolt, defendants' exhibit 1, is what they call a ringbolt with a lag screw, and it is used for various purposes on ships to secure articles on ships." (T. 40.)

The witness uses the very important language:

> "One cannot tell by looking at it, except from below, if this bolt was clinched under deck."

It was the defendants in the construction of the vessel which used this bolt for a purpose for which it was not intended. Even their own witness, Captain Lancaster, so testified on page 55 of the transcript, when he said:

> "They (the ringbolts) are not to be used for moving cargo, because they are not proper bolts in deck construction."

Plaintiff did not know that bolts that are "not proper in deck construction" were used on the deck. Plaintiff said:

> "Seamen, sir, do not use that kind of bolts for any purpose, for heaving, for lashing, or holding, because that bolt is unsafe to be on board a ship."

The respondents say on page 10 in the brief:

> "We recognize that the plaintiff's statement must be taken as true for whatever it is worth in determining the correctness of the court's ruling in directing the verdict for the defendants."

Witness Ainsworth said:

> "The ringbolt, defendant's exhibit one, is what they call a lag screw, and it is used for various purposes to secure articles on ships."

But the plaintiff did not know that a bolt not intended for moving cargo, was placed in the deck department where it was not proper to place such a bolt.

The respondents say:

> "There is no evidence of any custom obtaining for the use of this bolt for the purpose of moving cargo." (Brief page 10.)

That is absolutely correct. The custom was just the other way, namely to use a bolt that was safe. The custom must have been as Captain Lancaster said: The ringbolts are not proper bolts in deck construction. (55) We think that the custom is to have "proper bolts in deck construction."

Again the respondents say:

> "Proper equipment was provided for the purpose of moving cargo".

Plaintiff testified:

> "The reason I put the line around this particular bolt is this: When we started to heave the load aft the deck, and the first that happened was that the line jumped off the particular spool in the corner, she jumped clean out and nearly knocked my head off. That is the reason I had to put it in the ring bolt to hold it down". (T. 73.)

If the plaintiff had been able to get a snatch block and if the bolt had been a customary bolt,

clenched below, the equipment would have been proper. Plaintiff had no time to screw out a bolt and find out that it was only seven inches, and not clenched below, he had to hurry, because the mate "came around and cursed and swore at the second mate because the lumber was not coming fast enough". (T. 46, at the top of page.)

It is an absolute fact, we heartily agree with the respondents, that this ringbolt was used for a purpose for which it was not intended. But it was "used" by the respondents who put it there where it was not proper in deck construction.

The following is also testimony by the defendants' witness Finck, and shows how entirely mistaken the defendants in error are when they say that the plaintiff used the ringbolt for a purpose for which it was not intended.

Witness Finck says:

> "In all my experience I have never seen a line led through a ringbolt and around a lead to the windlass *without the use of a block.*" (T. 67.)

This shows that a lead was run through a ringbolt even from the testimony of a witness for the defendants, but not without the use of a block.

It was this block which was denied the plaintiff. (T. 28.)

Witness Becker for the defense testified:

> "The other way is to take the wood, tie it fast to the lead, put a snatch block on the lead pull it back with the quarter chock, go ahead

> with the winch, and then load it wherever you want to."

Notice that the witness says "Put a snatch block on the load."

This block was denied the plaintiff. (T. 28.)

Witness Cleaver for the defendants testified also to the effect that a ringbolt is used in connection with a snatch block as follows:

> "It would not be safe, the rope would give way, if there is no fair lead, if there is no snatch blocks". (T. 53.)

Both the court on page 78 of the transcript and the respondents on page 11 of their brief say that the plaintiff in error misstates the testimony of witness Lauritzen. Counsel is still of the opinion that he interpreted Lauritzen's testimony correctly and that the court as well as the opposing counsel are the ones who misunderstood his testimony. We contend that Lauritzen intended to say and did say just what the plaintiff and witness Lancaster said (T. 54) that such a bolt was not proper "in deck construction", as it was not clenched below. Lauritzen was called as a witness for the defendants, and the counsel for the defendants on direct examination did not ask one question indicating that the plaintiff did not properly use the appliances. This, among other matters in his testimony, indicates to us that the counsel at that time knew that his testimony would be adverse, but on cross-examination Lauritzen said:

"Q. You have been a winch driver for many years, haven't you?

A. Yes, sir. For several years.

Q. And saw them use this particular bolt in many places the same as it was used that time, it was nothing unusual?

A. They usually lead the way it will lead best.

Q. And do not stop to make an inquiry, Mr. Lauritzen, if the ringbolt is fastened enough; they take it for granted it is solid enough?

A. Yes, sir.

Q. And at this time fastened the way it was, you took it for granted it was like any other bolt on the ship?

A. Yes, sir.

Q. And if it hadn't been the same way it was generally done you would have known it, because you have been a winch driver for many years?

A. I guess so."

This is the tesitmony of Lauritzen whom the respondents claim testified that the plaintiff made an improper use of the appliances, and which we claim is in plaintiff's favor.

The respondent contends that Lauritzen meant that by reason of the position on the deck that the plaintiff should have known better than using it, but from the following testimony it is clear that the witness meant that no one used such a bolt at such a place.

This appears from the redirect examination by the attorney for the defendants, as follows:

"Q. You never saw a bolt used like this before this time for that purpose, did you?

> A. I could not say exactly that I had, not a bolt like that. There are so many different kinds of bolts on a ship." (T. 23.)

It was only after the bolt was pulled out that Lauritzen found anything unusual with the bolt, and he said:

> "I remember I took up the bolt and said, 'No wonder it pulled out,' because I thought it was rather small. I don't remember seeing one used like that for that purpose." (T. 24.)

From the fact that witness said "like that" for that purpose, after he had seen that it was so small, this shows that he referred to the owners using the bolt and not to plaintiff.

> "I thought it rather small for the use to which it was put", said Lauritzen. (T. 24.)

The bolt was too short, and that is why Lauritzen said that he had never seen anybody use such bolt for such purpose. That could only be seen after it was pulled out.

It is reasonable that when he said that he thought that it was rather small for the use to which it was put, he meant that it was too short. Witness Aezer, who repaired the bolt, said:

> "I lengthened it from seven to seventeen inches and put a nut on the end and put it back in the hole." (T. 47.)

Notice that he did two things, made it three times as long as it was, minus one inch, and put a nut on it.

That made the bolt three times as large. The argument has been made by the defendants in error that the ringbolts were used to fasten the booms to. The respondent says:

> "A ringbolt is used for stoppers for lines, for mooring lines, it is sometimes put there to make booms fast." (T. 57.)

See respondent's brief page 12.

The above may be true but it does not rebut the fact that the ringbolts were used just as plaintiff used them. If we take a look at a drawing on page 36 of the transcript, we can see at once that the ringbolts are not so placed as a man would place them in order to fasten the booms to the boom rest. Notice that the two bolts are far from the boom rest. They are in front of the boom rest and to one side. If they had been intended for the boom rest they would have been placed one on each side of it, and not far in front and both on one side.

The defendants in error make a grave mistake when they claim on page 17 of their brief that:

> "It is not disputed that plaintiff was in charge of the work and selected his own method of using the ship's equipment."

The plaintiff testified:

> "There was another way of doing it, if the mate would have given me time to rig up the gears." (T. 73.)

Witness McFadden said:

> "In the meantime the first mate had come around, and cursed, swore at the second mate,

> because the lumber was not coming fast enough." (T. 45, at the bottom of page.)

The defendants' counsel are not familiar with the testimony. If they had been they would not, if we know them right, have made such an unfounded statement as the one just cited.

> "We recognize," says the brief of the respondents on page 10, "that the plaintiff's statement must be taken as true, for whatever it may be worth, in determining the correctness of the court's ruling in directing the verdict for the defendants." (Defendants' brief page 10.)

The above is undoubtedly true.

A peculiar argument is made on page 19 in the brief of the respondent. It is this:

> "6. Even if the bolt were loose which does not appear, it was the plaintiff's duty to inspect it."

The argument is based on the testimony of one of the owners of the vessel, Mr. Mahoney, who said that it was the mate's duty. Mr. Mahoney said: "The mate would have to know if the bolts and screws were not in shape." Mr. Mahoney testified:

> "We leave it to the captain to look after the deck department; he in turn instructs the mate, if there is anything wrong, to report to him, and he in turn reports to the superintending engineer, who is a practical man and he in turn goes and looks her over." (T. 70.)

Mahoney says:

> "I told no one to look after these bolts." (T. 71.)

But the master knew they were not clamped, and just screwed down in the deck, and he did not tell Sporgeon about it. (T. 52.)

The manner of fastening the bolts was so dangerous that the court said:

> "Because they (the ringbolts) are liable to turn or screw out and the friction is likely to tear them loose, as was done in this case." (T. 76.)

It seems so reasonable that when the master on the vessel knew the way the bolts were fastened, that he should have told the second mate about it, but instead the master said:

> "I would say you could use it for discharging a load or two like he did."

It seems strange to us that the plaintiff is accused of negligence for doing just what the master said could be done.

REPLY TO THE LEGAL ARGUMENTS.

There is no denial of the fact that the law requires a greater degree of care of a shipowner than of a landsman, on which point we cited many cases in our brief. There is no denial of our point to the effect that the court was mistaken in law when the court said that the degree of care of a shipowner and a landsman was the same. There is no denial of the fact that the court had forgotten the testimony of Sporgeon when the court said that Sporgeon was to blame for not using blocks. We have

then this situation, namely: what would the court have done, if the court had had the right idea of the degree of care required, and also what would the court have done, if his honor had not forgotten that the plaintiff demanded snatch blocks and was refused. We think we are justified from the testimony to reason that it was the defendants who used a lag screw for that for which it was not intended. Such a screw was dangerous no matter for what purpose it was used.

Variance.

It is argued in all sincerity that the variance between the pleadings and the proof prevents the plaintiff from any recovery.

We contend that there was no variance. We call the court's attention to what the defendants claim is a variance. The defendants claim:

> *"The alleged negligence cannot be considered as it is not within the issue."*

This is the reason given in plaintiff's brief on page 33:

The negligence of the mate in not furnishing the plaintiff with a snatch block was within the issues as well as the dangerous condition of the ringbolt.

The answer sets out that the plaintiff was injured because he did not use a snatch block. (T. 15.) There was at no place any objection to any testimony having reference to snatch blocks. The testimony about snatch blocks was so fully considered as

if the pleadings, the complaint as well as the answer, had dealt with it.

> "Issues may be raised not only upon the complaint but also upon new matters in the answer."
>
> *Rogers v. Riverside Land Co.,* 132 Cal. 9; 64 Pac. Rep. 95.

Our Code C. P., Sec. 590, provides:

> Issues may be raised:
>
> (1) Upon material allegations in the complaint.
>
> (2) Upon new matters in the answer.

Even if the defendants had not raised the matters of not using snatch block in the answer, since it was used on the trial without any objection, the matters about variance cannot be argued.

It is well expressed by the Eighth C. C. A. in the case of *United Kansas Portland Cement Co. v. Harvey,* 216 Fed. 316. The citation is from page 319:

> "In Derham v. Donahue, 155 Fed. 385, 83 C. C. A. 657, 12 An. Cas. 372; this court held that under the statute of Jeofails (Sec. 954 R. C.) where the defendant could not have been mislead in his preparation for trial, it is the duty of the court to permit an amendment, if necessary. As stated in Reynolds v. Stockton, 140 U. S. 254, 266, 11 Sup. Ct. Rep. 773, 35 Law Ed. 464, in speaking of a case in which while the matter was not, in fact, put in issue by the pleadings, but evidence had been introduced by both parties and the matter actually litigated.
>
> "In such a case the proposition so often affirmed that that is to be considered as done

which ougt to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been done."

The revised codes, sec. 954, is sec. 1591 of the C. Stat., United States, and reads as follows:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any part of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matters of law shall appear to it, without regarding any such defect, or want of form, except those which, in case of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

31 *Cyc.* 703 says:

"It has been decided in a number of cases that a variance to be material must be such as to mislead, or surprise the adverse party."

Sec. 469 *C. C. P.* provides:

"No variance between pleading and proof is deemed material, unless it has actually mislead the adverse party. Whenever it appears that a party has been mislead. the court may order the pleading to be amended, upon such terms as may be just."

There is no variance between pleading and proof: The complaint says:

> "The said defendants, acting by and through the said managing owner, and by and through the officers in charge of said vessel, failed and neglected to keep the said vessel and its appliances in a reasonable safe condition."

We are at a loss to understand how this can be a variance when it is shown in the testimony that the bolt was so "loose", that, to use the expression of the judge who tried the case "they are liable to turn and screw out and the friction is likely to tear them loose, as was done in this case". (T. 76.) It must seem strange for a reasonable person when it is contended that this appliance was an ordinary safe appliance. It was this kind of appliance that a witness, Capt. Lancaster, for the defendants, referred to when he said: "They are not proper bolts in deck construction". (T. 55.) It was in deck construction right on the poop deck that this bolt was located. (T. 36, the drawing of the vessel's deck.)

When you look at the drawing take notice how difficult it is to believe that the ringbolts are used for the purpose of fastening the booms, because they are to one side of the boom rest, and too far away for that purpose.

Many old cases are cited in the brief of the respondents in order to show that no liability is incurred in the event that the plaintiff is improperly using an appliance. But this plaintiff comes under

the railway employer's liability law which applies to seamen and the Supreme Court of the United States has passed on the Jones' Act, and under that act contributory negligence is no defense, even if it was negligent to use a bolt that looked so strong that you could moore the court house to it, but which in fact was so weak that it might come out by itself.

The master knew that this bolt was improperly fastened, and the liability in such cases is well stated in *Henry Gillens Sons Lighterage Co., Inc. v. Fernald,* (1923) Sec. C. C. A., 294 Fed. 520, citation from page 522:

> "The owner cannot escape liability because another of his crew failed to repair with material at hand so obvious a defect which rendered the lighter plainly unfit for the contemplated work."

Again the same court says:

> "The seamen were bound to use the equipment at hand and appliances which the owner furnished, and they were on their part bound to furnish and maintain equipment and appliances for the seamen to use at least free from defect known or which ought to be known."

We respectfully ask that a new trial be granted.

Dated, San Francisco,
November 18, 1925.

Respectfully submitted,
S. T. Hogevoll,
Attorney for Plaintiff in Error.

No. 4586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

12

OSCAR SPORGEON, *Plaintiff in Error,* vs. ANDREW F. MAHONY et al., *Defendants in Error.*	

Petition for Rehearing on Behalf of Defendants in Error.

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Petition for Rehearing on Behalf of Defendants in Error.

To the Honorable William B. Gilbert and Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

We are reluctant to file this petition. We do not like to question the soundness of a decision of this court. But we do quite sincerely believe there is error in this reversal. And, so believing, we think the court will not misapprehend our coming to it again to discharge the duty we feel we owe to our client of respectfully submitting what seems to us to be the error in the opinion.

This is a writ of error to review a judgment following a directed verdict for certain defendants in error in an action for personal injuries. We feel persuaded that had a verdict been given by the jury in favor of the plaintiff below, it would have been the duty of the trial court to have set it aside; and if this be the case, under the well-settled rules of the federal courts, the directed verdict was proper.

The complaint in this action, it will be remembered, proceeds on the theory that defendants failed to exercise reasonable care that a certain ring-bolt was "so fastened that the same would resist an ordinary pull *for which said bolt was intended*".

It is conceded, however, that the ring-bolt was put into the ship for an entirely different purpose from that for which it was used by plaintiff when he received his injuries. It is not disputed that the ring-bolt was of proper and customary construction for its intended use, namely, lashing the booms to the deck or for "stopping" lines, *but was not intended* as a base through which to reeve ropes in hauling cargo about the deck. It was neither alleged in the pleadings nor contended upon the trial that anyone directed plaintiff to use the bolt in the manner in which he did, plaintiff admitting that he was in charge of the work on the after deck and had the power and authority to select his own method of performing the task he had to do. It affirmatively appears, moreover, that defendants had provided properly constructed substantial bitts and a heavy rolling chock for the very purpose of doing the work to per-

form which plaintiff employed the ring-bolt.

As a matter of law, it is not suggested, nor could it be that a master owes any general duty to make an appliance safe for any purpose other than that for which it is intended; nor is it disputed as a legal proposition that the mere fact that the appliance happens to be placed where it can be misused by a servant does not warrant the inference that the master is at fault in not knowing that he is likely to do so.

The basis for the doctrine that the master is not liable when appliances are diverted to purposes other than those for which they were intended is that a situation supervenes which the master cannot be held to have anticipated. He is therefore not bound to provide against the dangers created by it. It follows that the fundamental and primary question to be decided in this case is whether this record shows any evidence of negligence on the part of these defendant shipowners. If it does not, then the issues of assumption of risk and contributory negligence, of course, need not be considered. If it does not, then whether plaintiff's act was or was not positively negligent is immaterial, as his act was one which defendants could not reasonably have expected him to commit.

In a case of this kind where an appliance is used improperly, resulting in injury to the person who misused it, the only condition upon which a defendant master can be liable is when he is charged with knowledge that the appliance is being wrongfully used, and acquiesces in such improper use.

May we not fairly say that this is the basis of the decision, which we are respectfully asking to have reconsidered, as appears from the concluding sentence of the opinion:

> "There appeared enough to call for submission of the testimony as related to the doctrine that acquiescence of a master in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose."
>
> *Labatt, Master and Servant,* Sec. 923.

But, with all deference we submit that this record could not support a verdict for plaintiff on this theory.

In order to make the master liable for an injury resulting from a servant's improper use of an appliance, it is necessary for the servant to prove, either:

(1) that the misuse is done by the master's express order or by his consent; or

(2) that it is done in pursuance of a custom which has become general enough so that the master's acquiescence can be presumed.

The mere fact that the appliance may have been misused occasionally prior to the accident will not justify the inference that the master acquiesced in such misuse. There must be an affirmative showing to that effect or a general custom or practice must be proved.

The rule, it seems to us, is quite clearly stated in the very work cited by this Court, *(Labatt on Master and Servant).* This author reviewing the rule with refer-

ence to a master's acquiescence in the improper use of an appliance, says (Vol. 3, p. 2465):

> "The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose. Accordingly, a qualification of this rule, that a servant cannot recover in the absence of evidence showing that the appliance in question was constructed with reference to the use to which it was being put when the accident occurred, is admitted in cases where it appears that it was customary for employees to put it to that use, and that the master knew of this custom. *But the mere fact that an appliance had been diverted to new uses before the accident in suit will not render the master liable, if that diversion occurred without his knowledge or consent. Nor is an occasional improper use of an appliance, not in pursuance of a recognized custom, sufficient to render the master liable on the ground of acquiescence.*" (Italics ours.)

The cases supporting this doctrine are quite numerous, and only a few of them need be noted here.

In

Teetsel v. Simmons, et al., 34 N. Y. Sup. 972,

plaintiff sought to recover for personal injuries caused by the breaking of a platform or switchboard on which plaintiff stood while working a switch. The evidence showed that this switchboard was not intended to be a passageway from one part of the building to another, but was to be used as a switchboard only. It was shown that it was occasionally used by some of the workmen as a passageway. There being no showing,

however, of any custom or any affirmative proof of authority given by the defendants so to use it, it was held that plaintiff was not entitled to recover. The syllabus reviewing the case reads as follows:

> "Where an appliance which is sufficient for the purpose for which it was intended is occasionally used by the workmen for another purpose, for which it is not sufficient, but such use is not in pursuance of any custom or by any authority of the master, a workman injured by such improper use cannot recover against the master."

So in

Sievers v. Peters Box & Lbr. Co., 151 Ind. 642, 50 N. E. 877,

plaintiff was injured by reason of the falling of an elevator in defendant's factory. It was shown that the elevator was designed for the carriage of freight only. It was complained that the elevator was defective as it did not have safety appliances thereon. It was further shown that the accident occurred on the first day of the operation of the elevator, and that on that day a good many other employees had ridden up and down upon it. It was held that there was no duty on the part of defendant to put safety appliances on a freight elevator, and that the mere fact that a number of other employees had ridden upon it could not alter the situation in the absence of proof of knowledge and acquiescence of the defendant, and that no custom or practice for the improper use of the elevator was established by such testimony.

The same principle is applied in

Burns v. Old Sterling Iron & Milling Co., 188 N. Y. 175; 80 N. E. 927,

the syllabus in which case reads as follows:

> "Where a mine was equipped with a system of ladders, well lighted, kept in good order, and commonly used by the mine employees in going to and from the mine, though the master mechanic, the mine boss, the blacksmith, and two miners occasionally rode in a car used for hoisting ore, one of the miners testifying that the mine boss told him not to use the car, the court should have decided as a matter of law against plaintiff's contention that the car was an appliance furnished by the master to be used as a passenger elevator."

So also in

Staley v. Wehmeier, 187 Ky. 445, 219 S. W. 408.

Plaintiff was injured by attempting to use a coal chute door as a passageway. The evidence showed that the door had been used occasionally by employees for convenience as a means of egress and ingress. It was held that this would not make the master liable for the misuse of this door, as he had provided other safe ways of entering and leaving the plant. There was held accordingly to be no evidence whatever of negligence, and a directed verdict for defendant by the court below was affirmed by the appellate court.

See also

Hahn v. Chicago M. & St. P. Ry. Co., 196 N. W. (Minn.) 257,

(Plaintiff injured by using a housing box as a plat-

form cannot recover damages, notwithstanding the testimony that other employees had at times used the housing in a similar fashion.)

Dawson v. King, 222 S. W. (Tex.) 164.

(Employer owed no duty to make a door safe as a means of ascent to upper floor unless he knew or should have known that employee was so using it.)

A careful search of the authorities has revealed no case where a defendant was held liable for a servant's misuse of an appliance except on one of the following three grounds:

(1) the servant was ordered to use the appliance as he did;

(2) the master had actual knowledge of the misuse and acquiesced in it;

(3) the misuse was in pursuance of a custom or practice of which the master had actual or constructive notice.

We believe there is no evidence in the record of this case which will support any of these three propositions. There is not the slightest claim of any showing of actual knowledge of the misuse of this ring-bolt on the part of any of the defendant shipowners, either on the occasion of this accident or at any time prior thereto.

Nor is there any showing of a general custom or practice obtaining for the use of this bolt for the purpose of moving cargo about the deck. It is true that the plaintiff testified that the ring-bolts were being used

by the chief officer and the third officer in loading the vessel (Tr. p. 28). This is the only instance disclosed by the record of any prior use of these bolts for any purpose other than that for which they were intended to be employed. It is conceded that for the purpose of determining the correctness of the ruling of the court directing a verdict, the plaintiff must have the benefit of any evidence which is conflicting, but it also must be admitted that uncontradicted evidence offered by defendants must likewise be received and considered. On this issue, therefore, as to whether there was any custom or practice of using these ring-bolts as plaintiff used them on this occasion, we have plaintiff's statement that they were used on one occasion during the loading. On the other hand, there is the testimony of the winchdriver Lauritzen that he had never before seen an eye-bolt used like this one was used (Tr. p. 21); the witness Cleaver, for two years second mate and chief officer on the vessel, who testified that never during that period were the ring-bolts used for any other purpose than that for which they were put into the vessel (Tr. p. 53); and also Captain Halvorsen, master of the ship for a little over a year, who stated that he had never seen the ring-bolt used in connection with handling lines prior to the occasion involved in the present case. This then is the state of the record on the question of any custom or practice with reference to the improper use of this equipment.

Nor can it be said that the chief officer stood in the shoes of the defendants so that his alleged acquiescence

in the use of these ring-bolts for handling cargo was that of the shipowners. The captain of the ship, it is true, might be held to be the representative of the shipowners as to the condition of the deck department (Mahony, Tr. p. 77). Had there been any showing that the captain authorized these ring-bolts to be used as plaintiff used them, it might be arguable that this would be evidence of acquiescence on the part of the master in a servant's misuse of appliances; but so far as concerns the after end of the ship where these bolts were located, the evidence shows without conflict that plaintiff, himself, the second mate, was in complete charge. This appears from plaintiff's own testimony.

Sporgeon (Tr. p. 26):

> "On this particular day we were busy discharging lumber, and about eleven o'clock in the morning *on my end of the ship,* the chief officer, Ole Grande, came to me and said, 'Well, this afternoon, Mr. Sporgeon, you will have the longshoremen remove the laths from the hatch aft and amidships'."

And again on page 37 of the transcript:

> "I was in charge of the operations."

Other witnesses, both for plaintiff and defendants testified to the same effect:

Mahony (Tr. p. 71):

> "If anything was wrong on that deck, the after end, that would be under the second mate."

Lauritzen (Tr. p. 21):

> "The second mate had charge of the work on the after deck; I do not know where the first mate

was, the first mate was looking after both ends; he had charge of the whole thing, and the second mate had charge of this particular operation.''

McFadden (Tr. pp. 44, 46):

> ''The second mate superintended the job. * * * Two sailors were in charge and they were taking orders from the second mate.''

Grande (Tr. p. 64):

> ''Sporgeon had charge of the after end of the ship at that time. I gave him orders to see that different orders came aft. There was a load to be hauled aft and away from some other lumber that had to come out first. I gave him instructions to move it aft, but not how it should be done. I did not direct him how to put up the lines, he knows that much himself. That was left entirely to him. I did not give him (any) instructions as to the use of an eye-bolt. I did not see any of the operation of moving this lumber aft. I was in the other end of the ship then. I first heard of the accident an hour afterwards, when the winch driver told me about it.''

It thus affirmatively appears that plaintiff himself was in full charge of the operation, and that the method of doing this work was entirely upon his own volition.

Had no other means of performing this task been provided, defendant might be held to have acquiesced in the manner in which plaintiff did it, but there is no showing of that whatever. The testimony shows conclusively that it was not necessary to use this ring-bolt at all to accomplish the work that plaintiff had to do. It is admitted by plaintiff himself that the rolling chock was properly constructed and was in good work-

ing order (Tr. p. 39). Captain Halvorsen (Tr. p. 51), Mr. Becker (Tr. p. 59), Mr. Cleaver (Tr. p. 53) and Captain Lancaster (Tr. p. 55) all agree that it would be easy and simple to do the particular job which plaintiff had to perform with the equipment provided on the vessel for that purpose. It is therefore apparent, and we submit uncontradicted, that defendants had provided adequate facilities to do this work which did not require the use of this ring-bolt. With this array of testimony to meet, it is evident that plaintiff could not possibly recover without justifying in some way his deliberate failure to use the safe method of doing the work provided for him in favor of the unsafe method he chose, with its probable, we may well say inevitable, consequence of injury to someone in so doing. His testimony falls far short of meeting it. After plainly testifying upon his case in chief that he proceeded immediately to use the ring-bolt at the very inception of the work, plaintiff asserted in rebuttal that when he started to heave the load aft, the line "jumped off that particular spool in the corner", and that he put it through the ring-bolt to hold it down. If this testimony means the plaintiff attempted first to use the chock provided on the ship, before he tried to use the ring-bolt, it does not mean, we respectfully submit, that the chock was "impracticable or dangerous" as the opinion of this court suggests. With every expert agreeing that the only proper method of accomplishing the work was to use the chocks provided for the purpose, with the master of the ship and the former

mate testifying without contradiction that for at least three years the chocks had been continually and solely used for this work, the only possible inference to be drawn from plaintiff's recital, assuming that his ambiguous testimony means that the chock was used at all, is not that it was impracticable, but that plaintiff was not handling it in proper fashion. If, indeed, the rope jumped off because the load was two feet above the level of the poop deck when suspended by the falls, why plaintiff could not have directed the winchdriver to have slackened the falls and dropped the load a foot or two, is not apparent.

As a matter of fact, however, plaintiff made no contention that it was necessary to use this ring-bolt in heaving the load aft. Plaintiff admits that there was another way of doing this work, but attempts to take refuge in the assertion that the mate did not give him time to rig up the gears. Although not discussed by this court in the opinion, we believe there is merit in the contention urged in our brief that this claim, that the mate unduly hurried the plaintiff in his work, could not be used to support a verdict, as no contention of the sort was pleaded. If the rule of variance means anything, it seems to us it should not allow a plaintiff to file a complaint charging *defective appliances,* permit the deposition of a witness to be taken on that issue without suggesting anything else, and then urge for the first time at the trial when that witness is no longer available, that the witness was at fault in hurrying plaintiff so that he was obliged to misuse the ship's equip-

ment. Be that as it may, however, we still insist, that even considering this evidence and giving it its full effect cannot change the result. Plaintiff was not a mere seaman, he was a licensed officer and in charge of the operation. It is nowhere suggested that anyone ordered him to use the appliance as he did. In any event, we think that the proof in this connection is not evidence of negligence on the part of the chief officer. In substance, all the testimony amounts to is that the mate was anxious to complete the job as speedily as possible, but there is no showing that he forced plaintiff to do the work in the manner in which plaintiff ordered it done. We do not understand on what theory it could be successfully contended that the desire on the part of the mate to have this work accomplished quickly could possibly excuse the man in full charge of the after end of the vessel from taking reasonable precautions not only for his own safety but for the safety of the men under his direction. Furthermore, as has been pointed out in the brief, it affirmatively appears from plaintiff's own testimony that two hours elapsed from the time he first received instructions to remove the laths until he actually commenced the work; this in the face of his statement on cross-examination that it would have taken but fifteen minutes to a half hour to have done the work in a proper manner. We think it clearly appears from the whole record that this claim of plaintiff that he was crowded for time falls far short of creating liability against defendant shipowners for this accident.

The following three propositions fairly appear in this case, and unless we are overlooking something,

are conclusive against plaintiff's right to recover:

(1) the appliance alleged to be defective was entirely proper and suitable for the purpose for which it was intended;

(2) the appliance was devoted to a wrongful purpose by plaintiff himself without orders from anyone;

(3) there is no evidence of acquiescence on the part of the master in the improper use or of any custom or practice of such misuse, of which the master had actual or constructive knowledge.

We respectfully urge that this court reconsider its former opinion and enter a decision affirming the judgment of the district court.

Respectfully submitted,

FARNHAM P. GRIFFITHS,
HAROLD A. BLACK,
McCUTCHEN, OLNEY, MANNON & GREENE,
Attorneys for Defendants in Error.

Dated San Francisco,
February 15, 1926

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the attorneys for Defendants in Error herein; that the foregoing petition for rehearing is, in my judgment, well founded, and that it is not interposed for delay.

FARNHAM P. GRIFFITHS.